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No. 96-1581

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

WHETHER THE YANKTON SIOUX RESERVATION HAS BEEN DISESTABLISHED OR DIMINISHED BY VIRTUE OF AN 1894 ACT ADOPTING A "CESSION AND SUM CERTAIN" AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES AND BY VIRTUE OF ITS CENTURY LONG TREATMENT AS DISESTABLISHED OR DIMINISHED?

LIST OF PARTIES

Parties to this case are: the State of South Dakota, Petitioner; Yankton Sioux Tribe, a federally recognized tribe of Indians, and its individual members, Respondents; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe, Respondent; and Southern Missouri Waste Management District, a nonprofit corporation, Respondent. As was stated in the Brief of Respondent, Southern Missouri Waste Management District, on Petition for Writ of Certiorari at 1, n.1, the full and correct name of the District is Southern Missouri Recycling and Waste Management District. This entity was formed in August 1994, and had begun functioning as a political subdivision of the State of South Dakota under South Dakota Codified Laws 34A-16-1, et seq., at the time this litigation was instituted. Respondent Yankton Sioux Tribe presumably overlooked that fact when the complaint was filed against the initial nonprofit corporation. The full and correct name of that nonprofit corporation was Southern Missouri Waste Management Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

Page

STATUTORY REFERENCES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

DECISIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 99 F.3d 1439 (8th Cir. 1996) and is reprinted in Petitioner's Appendix to the Petition for Writ of Certiorari. App. 1-65.[1]

The Memorandum Opinion and Order of the United States District Court for the District of South Dakota is reported at 890 F.Supp. 878 (D.S.D. 1995) and is reprinted in Petitioner's Appendix to the Petition for Writ of Certiorari. App. 66-97. The Judgment of the District Court is unreported and appears in the Joint Appendix at JA 95.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on October 24, 1996. The State's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 6, 1997. App. 98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859). App. 99.

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894). App. 111.

STATEMENT OF THE CASE

The question presented is whether an 1894 Act, and subsequent historical developments, disestablish or

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[1] As used herein, "App." refers to the Appendix to the Petition for Writ of Certiorari; "JA" refers to the Joint Appendix.

diminish the Yankton Reservation, eliminating the 1858 reservation boundaries.[2]

A. Procedural background.

Southern Missouri Waste Management District (District), which was formed to develop a regional landfill, selected a site on fee land owned by a non-Indian in Charles Mix County. A three-day administrative hearing was held on the District's solid waste permit application before the State Board of Environment and Natural Resources. The Yankton Sioux Tribe intervened and participated in that hearing, without raising any jurisdictional claims. *See* T 306, JA 646. At the close of the hearing, the Board issued the District a permit. The Tribe thereafter filed an action in federal court pursuant to 28 U.S.C. § 1331, inter alia, requesting injunctive relief halting construction of the District's landfill, and requesting declaratory relief that the Tribe, and not the State, had jurisdiction to regulate the facility because the landfill allegedly lay within the 1858 boundaries of the Yankton Sioux Reservation. The State, brought into this action by a third-party complaint filed by the District, asserted that the 1858 reservation had been disestablished or diminished. The district court denied the Tribe's injunctive relief, App. 90, but declared that the Yankton Sioux Reservation had not been disestablished or diminished. App. 89. The State appealed that portion of the district court's

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[2] The State has used the term "disestablished" and "diminished" interchangeably to mean that the former reservation boundaries and status are "terminated" as in *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 (1975), and that "Indian Country" status attaches only to remaining or nonextinguished "allotments," *id.* at 427 n.2, 446-447; 18 U.S.C. § 1151(c), and "dependent Indian communities." 18 U.S.C. § 1151(b). *See also Solem v. Bartlett*, 465 U.S. 463, 467 (1984); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997). *But see Ute Indian Tribe v. Utah*, No. 96-4073 (10th Cir. May 8, 1997).

decision finding that the reservation had not been diminished or disestablished.[3] The court of appeals affirmed in a two to one decision. Subsequently, the unanimous South Dakota Supreme Court determined that the reservation had been diminished notwithstanding the decisions of the lower federal courts. *State v. Greger*, 559 N.W.2d 854 (S.D. 1997) (reprinted in Petitioner's Appendix to Petition for Writ of Certiorari at App. 125-158).

The issue remaining before this Court is whether the Yankton Sioux Reservation has been disestablished.

B. 1858 Treaty.

In an 1858 treaty, the Yankton Sioux Tribe "cede[d] and relinquish[ed] to the United States all the lands now owned, possessed or claimed by them . . . ," App. 100, except 400,000 acres (later surveyed at 430,000 acres),[4] which were particularly described. *Id.* Approximately 11 million acres were ceded. App. 6. The United States, in return, agreed to pay "one million and six hundred thousand dollars in annuities in the period of fifty years" and to "protect the said Yanctons in the quiet and peaceable

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[3] The Tribe did not appeal the injunctive relief it had been denied in district court. The Tribe had also asserted that the Environmental Protection Agency (EPA) had jurisdiction over the landfill based on 40 CFR Part 258. The district court noted, unremarkably, that EPA retained its federal powers until it delegated them to the State or the Tribe. DCO, App. 94. After entry of the district court's decision, the EPA denied the State's application for approval of its solid waste permit program which had been previously filed with regard to the area at issue here. 61 Fed. Reg. 48683-48686 (Sept. 16, 1996). The State has appealed this decision in a separate action in district court. (The Merits Brief of Southern Missouri at 1-7 sets out the procedural history in greater detail).

[4] After the 1858 Treaty was ratified, the United States performed a survey and determined that the area actually contained 430,495 acres. T 40-41, JA 575. The 1892 Negotiations proceeded on the basis of the latter figure.

possession of said tract of four hundred thousand acres of land. . . . " App. 102. The treaty provided that "[n]o white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians. . . . " App. 108. The United States also agreed to build schools, assist instruction in agricultural and mechanical pursuits, to establish a mill suitable for grinding grain and sawing lumber, and to set up mechanic shops. App. 104-105. The Tribe acknowledges that this 1858 "cession" of land for $1.6 million diminished the area over which the Tribe could maintain jurisdiction or governmental authority.

C. Prelude to 1892 Agreement.

Following the 1858 Treaty, "the northern plains region experienced extreme weather cycles of prolonged drought and devastating flood, leaving the Yankton Sioux desperate for cash and direct assistance." App. 70. Further, there was growing pressure by "white farmers, businessmen and railroad men" to open the surplus lands of the Yankton Reservation. *Id.*

In 1887, Congress enacted the General Allotment Act or Dawes Act, 24 Stat. 388 (1887), which enabled the "President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers. . . . " *DeCoteau v. District County Court*, 420 U.S. 425, 432 (1975). The district court found that "[o]f the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to Indians under the Dawes Act." DCO, App. 71. Further allotments amounting to approximately 95,000 acres were made pursuant to 26 Stat. 594 (1891). *Id.* Approximately 168,000 acres were unallotted, and therefore available for cession. *See id. See also* App. 9, n.9 (court of appeals implies that "approximately 200,000 unallotted acres" were available for cession).

In 1892, Congress enacted 27 Stat. 120, 137 (1892), which authorized funds "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the *surrender* of portions of their respective reservations. . . . " (emphasis added). In the same year, the United States appointed the Yankton Indian Commission which negotiated for the *"cession"* of the surplus lands of the Yankton Indians. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) (emphasis added) (hereinafter "Negotiations") 2; JA 109.

D. Negotiations.

Cession negotiations occurred in the latter part of 1892. *See id.* at 7, JA 122. The Tribe debated whether it should cede its lands at all, *see, e.g., id.* at 8-10, JA 125-129, and there was discussion as to whether the transaction should be an appraisal and sale of individual plots or a direct sale or cession to the government. *See, e.g., id.* at 75-78, JA 291-301. *See also id.* at 11-12, JA 133-136. Tribal and federal negotiators equated the contemplated transaction with the transaction by which the Tribe had ceded the 11 million acres of land to the United States through the 1858 agreement, *see id.* at 54, 56, 58, 59, 66, JA 225, 231, 236, 239, 262, and with the contemporaneous cession of the Lake Traverse Reservation which had effected disestablishment. *Id.* at 54, 68, 71, JA 226, 270, 279. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

During the negotiations, tribal members emphasized their belief that the government had not delivered on its former promises and threatened not to sign the new agreement for that reason. *See id.* at 55, 59, JA 226, 241. *See also id.* at 55-56, 65-66, 75, 80-81, JA 227-229, 259-263, 290-291, 306-308; App. 149. Further, Professor Hoover, the tribe's retained historian, testified that tribal members perceived a threat of the loss of annuities, T 53-55, JA 587-589, an extremely serious matter to the Tribe. (Annuities consisted of cash, guns, ammunition, food, clothing and other articles promised the tribe "primarily" under

the 1858 Treaty. *Id.*) Finally, statements were made which indicated that the transaction contemplated the end of reservation status. *See, e.g., id.* at 81, JA 309: "This reservation alone proclaims the old time and the old conditions. . . ."

E. Provisions of the 1892 agreement and proclamation opening the reservation.

An agreement was signed and dated December 31, 1892. App. 111-124. Article I contained clear language of *cession*:

> The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

App. 112-113. Article II established that the cession was for a *sum certain*:

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000) as hereinbefore provided for.

App. 113. Article X specifically referred to the "ceded" lands. App. 117. Article XVII prohibited the sale or transfer of intoxicating liquors in the "ceded" area. App. 120. The Article XVIII savings clause, upon which the Tribe's case has rested, reads as follows:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and

> the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Id. Congress "accepted, ratified and confirmed" the agreement, App. 122, and provided that upon the Presidential Proclamation opening the area, the 16th and 36th sections in each congressional township were "reserved for common-school purposes and [ ] subject to the laws of the State of South Dakota." App. 123.

During debates on this and several other cession agreements, congressmen indicated that the lands in question here and in the other agreements would be returned to the "public domain." *See* 53 Cong. Rec. 6425 (1894), JA 380 (Rep. McRae); *id.* at 6426, JA 386 (Rep. Hermann).

In 1895, President Cleveland opened the reservation, stating that the Yankton Indians had "ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation" as set apart by the 1858 agreement. 29 Stat. 865 (1895), JA 453.

F. Subsequent historical developments.

1. Jurisdiction.

The State assumed virtually unquestioned exclusive jurisdiction over all persons in the area following the President's Proclamation opening the ceded lands. The divided panel noted the exercise of jurisdiction by the state of South Dakota in an "1895 criminal case, *State v. Andrew War*." App. 33. *See* Exh. 638, JA 458. The panel acknowledged that,

> state government has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently.

App. 38. The panel also found the "tribe presented *no* evidence that it attempted until recently to exercise civil, regulatory or criminal jurisdiction over nontrust lands." (Emphasis added.) App. 39. *See also* T 316-319, 646-647, 727-728, JA 654-656, 686-688, 703; DCO, App. 88; *Greger*, App. 154-155. Similarly, the United States has *not* exercised criminal jurisdiction over any person within the nontrust areas of the 1858 reservation. *See* Testimony of Tribal Chairman Drapeau. T 318, 330-331, JA 655-656, 667-668; *Greger*, App. 154.

2. Precedent.

This Court in 1914, just twenty years after the adoption of the agreement, effectively found that the reservation had been disestablished by referring to the "ceded lands *formerly* included in the Yankton Sioux Indian Reservation," *Perrin v. United States*, 232 U.S. 478, 480 (1914) (emphasis added). *Perrin* referred to the "original reservation" as embracing 400,000 acres and contrasted the original "practically 25 miles square" reservation to the 1914 "small scattered" tracts of 100,000 acres. *Id.* at 486. The South Dakota Supreme Court has found disestablishment for the fifth time in a recent unanimous ruling. *See State v. Greger*, App. 125, 138. The lower federal courts have also consistently treated the area as disestablished. *See* Dissent, App. 63-64 (citing cases); *Greger*, App. 137-138 (citing cases). *See also* App. 25, n.18 (citing cases). Indeed, the same district court which decided the case now before this Court entered a decision in 1995 treating the Yankton reservation as disestablished and that decision was affirmed, per curiam, by the court of appeals. *Primeaux v. Lee*, Civ. 94-4022 (D.S.D. June 14, 1995), *aff'd*, No. 95-2943 (8th Cir. Jan. 3, 1996) (per curiam). (Unpublished opinions lodged with Clerk.) *See also Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996) (Table).

3. Demographics.

At present, approximately nine percent of the area within the 1858 boundaries is trust land, *see* App. 42, n.25; T 645, JA 685.[5] The 1990 Federal Census data indicate that non-Indians constitute over two-thirds or 68 percent of the population. Exh. 614, JA 529, *see also* App. 42.[6]

G. Decisions below.

The district court, relying almost entirely on Article XVIII, found that the 1858 Yankton Reservation had not been disestablished by the agreement of 1892. The district court found that Article XVIII, when read with the "clear cession and sale clauses of Articles I and II, creates an internal inconsistency in the 1892 Agreement." DCO, App. 81-82. The district court construed the "ambiguity in favor of the Tribe" and found that the effect of Article XVIII was to "incorporate by reference the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 treaty." *Id.* at 82.

A divided three-judge panel of the Court of Appeals for the Eighth Circuit affirmed. The panel quoted the "cession and sum certain" language of Articles I and II of the Yankton agreement. *See* App. 13 & n.11. This Court, in *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984) has found that such an arrangement creates an "almost insurmountable presumption" of diminishment or, according to *Hagen v.*

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[5] The map at App. 159 is a recolored and reduced reproduction of a Bureau of Indian Affairs land status map generated after the district court's decision. (The phrase "Tribal fee to trust" area in the Legend, the purple lands, was apparently intended to denote lands held by the Tribe in fee for which trust application had been made.)

[6] The tribal chairman admitted that the tribal resident population statistics are not based on an actual count, but merely divide the total membership in half. T 313-315, JA 652-654.

Utah, 510 U.S. 399, 411 (1994), a "nearly conclusive presumption" of diminishment.

Yet, the divided panel "never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted." Dissent, App. 47-48 (footnote omitted). Instead, the divided panel disregarded the presumption and treated it as a novel theory created by the State. *See* App. 14.

The divided panel instead relied upon prior circuit court opinion for the proposition that the Article I cession language, standing alone, did not evince a clear congressional intent to disestablish. App. 14. Nor did Article II support disestablishment, in light of its history. App. 15-16.

The divided panel determined that the Article XVIII savings section was "unusually expansive" and that, therefore, the other sections of the 1892 agreement "should be read narrowly to minimize any conflict with the 1858 treaty." App. 17. The panel rejected the State's argument that the specific provisions within Article XVIII for the continuation of "annuities under the said treaty of April 19, 1858" indicated that a narrower reading was to be given to the article. *See id.* at 17-18. The divided panel thus found that Article XVIII, when read in light of the canons of construction, required the determination that the reservation had not been disestablished. *See* App. 21.

Judge Magill dissented. Relying on *Solem v. Bartlett*, 465 U.S. at 470-71, Judge Magill found that the Yankton agreement "contained language of cession of land for a sum certain, which created 'an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.' " Dissent, App. 44. He noted that the divided panel had failed to address "the presumption created by Articles I and II together" and instead inappropriately had considered "each Article separately." *Id.* at 48. Judge Magill indicated that the circuit precedent cited by the majority actually supported diminishment, *id.* at 48-49. He also criticized the majority's dependence

upon legislative history to overcome the "cession" and "sum certain" language used by Congress, citing the principle that "the language actually chosen by Congress is the best indication of its intent." App. 49. He concluded that, in any event, the majority "has pointed to nothing in the legislative history that betrays a contrary intent" to diminishment. *Id.*

Judge Magill rejected the majority's reliance upon the Article XVIII savings clause, finding that a literal interpretation of Article XVIII would nullify other provisions of the 1894 Act for it would not allow transfer of lands from the Yankton Indians to the United States, nor would it allow white settlers within the 1858 boundaries. *See* App. 51-53, & n.32. He found that Article XVIII extended only to annuities and so could not "rebut the powerful presumption that the Yankton Sioux Reservation was diminished." App. 56.

Judge Magill also relied on the liquor prohibition of Article XVIII, on the grant of Sections 16 and 36 of the congressional townships for common schools, *id.* at 56-58, and on "striking passages" in the legislative history which anticipated the "termination of tribal governance." *Id.* at 59.

Judge Magill further relied on the jurisdictional history, noting the area's treatment as nonreservation "for the past century" by the state courts, *id.* at 62; and noting the usual treatment by the federal courts of the area as diminished, beginning with this Court's decision in *Perrin*, *id.* at 63-64. The dissent also noted the failure of the Tribe to exercise jurisdiction beyond its trust lands. *Id.* at 62.

Following the decision of the divided panel and the denial of rehearing and rehearing en banc (three judges dissenting),[7] the South Dakota Supreme Court unanimously

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[7] Judge Wollman recused himself from the original panel assigned to hear the case, and took no part in the rehearing

determined that the reservation *had* been diminished notwithstanding the very recent decisions of the lower federal courts in the case at bar. *State v. Greger*, App. 125-158.

SUMMARY OF ARGUMENT

1. This Court's disestablishment decisions determine that when Congress and a tribe employ "cession and sum certain" language in a surplus land agreement, an "almost insurmountable presumption" of disestablishment is created. The agreement with the Yankton Sioux Tribe used precisely such language; therefore, an "almost insurmountable presumption" of disestablishment arose. *Hagen v. Utah; Solem v. Bartlett; DeCoteau v. District County Court*.

2. Other provisions of the agreement as enacted enhance the presumption. For example, tribal members insisted that an anti-liquor provision regarding ceded lands be included in the agreement. Liquor was illegal on the reservation at the time of the agreement and therefore the tribal members would have had no reason to insist upon the provision unless they understood the reservation was being disestablished. The operation of the school lands provision also aids the presumption.

3. The savings section contained in Article XVIII does not overcome this "almost insurmountable presumption" of disestablishment. Article XVIII is internally ambiguous. It purports to protect *all* provisions of the 1858 treaty and also the *annuity* provisions of the 1858 treaty. Further, if the article actually were intended to protect all provisions of the 1858 Treaty, it would negate the 1892 agreement, for the 1858 Treaty guaranteed the

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process, App. 98, presumably because he had three times, while a member of the South Dakota Supreme Court, found the Yankton Reservation diminished. *See State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973) (Wollman, J. concurring specially); *see also State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977).

tribe "quiet and peaceable possession" of 400,000 acres and also forbade any "white person" from settling on the reservation.

The canons of construction do not support the divided panel's analysis of Article XVIII. A canon of construction, as *DeCoteau* holds, is "not a license to disregard clear expressions of tribal and congressional intent." The ambiguous language of Article XVIII simply cannot overcome the uniquely clear expression of tribal and congressional intent created by Articles I and II of the agreement.

Nor is there a basis to argue that the Tribe somehow "understood" the agreement to allow the transfer and white settlement of the ceded land, but not to disestablish the boundaries of the reservation. As this Court has stated, the common "notion" at the turn of the century was that when Indian lands passed from tribal ownership, they ceased to be part of a reservation. There is nothing in the record which supports the argument that the tribal members and the United States somehow came to an agreement that Article XVIII would overturn this widespread understanding. Finally, this Court's own precedent indicates that even savings sections which are *not* ambiguous will not prevent diminution or disestablishment of a reservation.

4. The record of negotiations confirms disestablishment. For example, tribal members and the negotiators consistently equated the arrangement being debated with the 1858 Treaty by which the Yankton Indians had ceded 11 million acres and with the contemporaneous Sisseton agreement which disestablished the Lake Traverse Reservation. Furthermore, the tribal members were told that the agreement should be signed because "the reservation alone proclaims the old time and the old conditions." Despite the extensive history, there is no mention of the preservation of reservation boundaries or of maintaining tribal authority over the lands to be ceded.

5. Judicial precedent strongly supports disestablishment. This Court's decision in *Perrin v. United States*, 232

U.S. 478 (1914) found in effect that the reservation had been disestablished by referring to the reservation as reduced from 400,000 acres to 100,000 acres by 1914. Precedent of the lower federal courts and the South Dakota Supreme Court confirm disestablishment.

6. The events subsequent to the opening of the reservation likewise confirm disestablishment. Most critically, the State assumed virtually unchallenged exclusive jurisdiction over the area beginning in 1895 and continuing until this litigation. The land area of the purported reservation is now 91 percent nontrust land and 68 percent of the residents are non-Indian. The century-long "reasonable expectations" of all persons in the area, Indian and non-Indians, are seriously upset by the decisions below.

ARGUMENT

In *Hagen v. Utah*, 510 U.S. 399, 411 (1994), this Court summarized the " 'fairly clean analytical structure' " it employs in diminishment cases:

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. . . . We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. . . . Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." . . . Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.

Application of this structure – which focuses on statutory language, historical context and subsequent events – compels a finding of disestablishment.

I. THE CESSION AND SUM CERTAIN LANGUAGE OF THE YANKTON ACT CREATES AN "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT. THIS PRESUMPTION IS STRENGTHENED BY OTHER PROVISIONS OF THE ACT.

A. Articles I and II of the Yankton Act contain language of "cession" for a "sum certain" and therefore an "almost insurmountable presumption" of disestablishment is created.

Articles I and II of the Yankton Surplus Land Act, App. 112-113, constitute a "cession" for a "sum certain":

> ARTICLE I
>
> The Yankton tribe of Dakota or Sioux Indians hereby **cede, sell, relinquish, and convey** to the United States **all their claim, right, title, and interest** in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.
>
> ARTICLE II
>
> **In consideration for the lands ceded, sold, relinquished, and conveyed** to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians **the sum of six hundred thousand dollars ($600,000)**, as hereinbefore provided for.

That this language creates a "cession and sum certain" arrangement is not disputed. *See DeCoteau*, 420 U.S. at 445-446. This Court has definitively established that the use of this language creates an "almost insurmountable presumption of diminishment":

> Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress

> meant to divest from the reservation all unallotted opened lands. (Citations omitted.) *When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.*

Solem, 465 U.S. at 470-71 (emphasis added). This Court recently reiterated that rule of law in *Hagen*, 510 U.S. at 411, finding that cession and sum certain language creates a *"nearly conclusive presumption"* of diminishment. Indeed, "cession and sum certain" language is "[a]t one extreme" of that which indicates diminishment, *Solem*, 465 U.S. at 469, n.10, and is also "precisely suited" to termination of reservation status. *DeCoteau*, 420 U.S. at 445. That the "almost insurmountable presumption" of disestablishment was created is beyond question.[8] *See also Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 760 (1985); *Id.* at 768.

Moreover, even absent the presumption recognized in *Solem* and *Hagen*, use of "cession and sum certain"

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[8] The presumption, and the great weight assigned to it, apparently flow from the universal turn of the century understanding that when land ceased to be held by Indians, it ceased to be Indian country or to be part of a reservation. *See Solem*, 465 U.S. at 468; *Bates v. Clark*, 95 U.S. 204, 208 (1877). This understanding was combined with a perception that the use of the term "cession" in the international context connotes the "transfer of territorial sovereignty by one State to another State." Jennings, *The Acquisition of Territory in International Law* (1963) at 16. *See also In Re Cooper*, 143 U.S. 472, 496 (1892); *Goetz v. United States*, 103 F. 72, 77 (S.D.N.Y. 1900); Treaty with Russia, 15 Stat. 539 (1867), Art. I, IV. The conveyance of "all" rights in the property, see, *Klamath*, 473 U.S. at 768, by way of a "cession" gained even greater weight when the tribe was guaranteed a "sum certain" which consummated the transaction, and which did not benefit the tribe "only indirectly, by establishing a fund dependent on uncertain future sales of its lands to settlers." *DeCoteau*, 420 U.S. at 448.

language would, *in this case*, independently carry "almost insurmountable presumption" of disestablishment. The 1858 agreement signed by the Yankton Tribe provided in Article 1, App. 100, that the tribe "cede[d] and relinquish[ed]" certain territory to the United States and in Article 4 provided for specific payments, or a "sum certain" to the tribe amounting to "one million and six hundred thousand dollars in annuities" as well as other payments. App. 102. The Tribe should be presumed to have the same understanding of both "cession and sum certain" agreements, i.e., that each conveyed all claim to and jurisdiction over the subject territory.

B. Other Articles of the agreement and congressional act aid the presumption of disestablishment.

1. The adoption of the anti-liquor provision at the demand of tribal members supports the presumption of disestablishment.

> Article XVII, an anti-liquor provision, provides: No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858. . . .

App. 120. The article thus makes federal liquor law applicable to the lands ceded by the Agreement. The provision would be surplusage if the reservation were not disestablished by the Act of 1894, as intoxicants were already forbidden in "Indian country" by federal law effective at least since 1877. *See* Strickland, *Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.)*, p. 305, n.189.[9] *See also* T 73, JA 606 (liquor illegal since 1832).

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[9] The majority incorrectly understood the Act of July 23, 1892, 27 Stat. 260, to be the initial act forbidding intoxicants in

This Court found, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 613 (1977), that a similar provision in a 1910 act raised an inference that that reservation was diminished:

> [t]he most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the Reservation.

(Footnote omitted.) The provision here can be given even *greater* weight than the anti-liquor provision in *Rosebud* (or a similar anti-liquor provision in *Solem*, 465 U.S. at 475, n.18), in that the Yankton anti-liquor provision was indisputably the product of negotiations between the tribe and the United States. Thus, the anti-liquor provision was included in the Yankton Agreement itself, rather than only in post-agreement legislation as in *Rosebud* and *Solem*, and was, moreover, inserted at the urging of the Indians themselves. According to the negotiators, "it was made an imperative condition of the sale, *by the Indians*, that whiskey should be excluded." Negotiations at 21, JA 154 (emphasis added). As Chief Jandran stated:

> I sign the treaty because it contains the article about the Pipestone Reservation, the whisky clause, and the clause for the care of the poor, for schools, etc.

Id. at 25, JA 162-163. The tribal members, of course, knew that liquor was already prohibited on the reservation and their demand that the liquor provision be adopted in the agreement speaks strongly to their perception that the agreement surrendered reservation status and that special protection was needed as a result.

Indian country. *See* App. 23. Regardless of the date used, however, liquor was illegal in Indian country by the time the proposed agreement was drawn and certainly by the time the agreement was signed on the last day of December, 1892.

Third, the 1893 Commissioner of Indian Affairs Report to Congress, which accompanied the proposed Yankton agreement, stated:

> Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation, seems to be a desirable provision, and from the decision of the Supreme Court in *United States v. Forty-three Gallons of Whisky* (93 U.S. 188), the stipulation would appear to be valid if ratified by the United States.

Id. at 6-7, JA 121 (emphasis added). In *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 195 (1876), this Court determined that the United States could prohibit the introduction of liquor *outside* of a reservation:

> If liquor is injurious to [the Indians] inside of a reservation, is it equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent?

The citation by the Commissioner of *43 Gallons of Whiskey* as the legal basis for the liquor provision strongly indicates his perception to be the same as that of the Indians signatory to the 1892 agreement: That the reservation would be disestablished by the agreement.[10] The anti-liquor provision thus strengthens the already weighty presumption of disestablishment.

2. The provision of the Yankton act relating to school lands strengthens the presumption of disestablishment.

The 1894 Act adopting the agreement with the Yankton Sioux Tribe provides specifically for the reservation of

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[10] The Commissioner's reference to the lands "*now* within the Yankton reservation," Negotiations at 7, JA 121, likewise strongly implies that the lands soon would *not* be on a reservation.

Sections 16 and 36 of each congressional township "for common-school purposes . . . subject to the laws of the State of South Dakota. . . . " App. 123. South Dakota's Enabling Act provides, however, that Sections 16 and 36 in each congressional township may *not* be granted to the state for common school purposes within Indian "reservations" until the reservations have been "extinguished" and such lands have "become a part of [ ] the public domain." 25 Stat. 676, § 10 (1889). As in *Rosebud*, 430 U.S. at 600-602, the language of the Yankton Act adopting the agreement indicates that the Enabling Act conditions had been fulfilled, and that the Yankton reservation had been "*extinguished* and such lands . . . restored to . . . the *public domain*." (Emphasis added.) H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907) later pointed out that four "precedents" justified the grant of such lands to South Dakota "based upon" its Enabling Act: The acts "opening" the Great Sioux Reservation and the Sisseton Reservation, an act providing for the sale of the Rosebud reservation, *and the act "opening the Yankton Reservation."* (Emphasis added.) Three of these reservations have been held to be disestablished or diminished; logic and history now support a finding of disestablishment with regard to Yankton, the fourth "precedent."[11]

II. THE ARTICLE XVIII SAVINGS SECTION DOES NOT OVERCOME THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT.

The Tribe relies almost entirely upon Article XVIII:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all

[11] The fact that the Tribe did not retain any lands for itself also indicates disestablishment.

> provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

App. 120. Article XVIII does not overcome the "almost insurmountable presumption" of disestablishment.[12]

A. The savings clause was included to preserve the annuities due the Tribe under the Treaty of 1858.

The historical record demonstrates that the primary purpose for adoption of Article XVIII was the preservation of annuities guaranteed under the Treaty of 1858. First, the text of Article XVIII specifically mentions only the annuities guaranteed by the 1858 treaty, *id.*, and the "annuities" guaranteed in 1858 are the only rights specifically identified to be preserved by Article XVIII in the Commissioner's report to Congress. *See* Negotiations at 4, JA 115. Second, the testimony of the historian retained by the Tribe strongly indicates that the section was included to preserve the 1858 annuities – i.e., the cash, guns,

[12] The quantum of evidence necessary to overcome the presumption has not been definitively articulated. An "almost insurmountable presumption" is not the same as an "insurmountable presumption." An "insurmountable presumption" is probably not a "presumption" at all, but rather is a "rule of law." *See generally* Strong, *2 McCormick on Evidence* (4th ed.) at 451. Ordinary presumptions have more or less effect, according to their terms. *See generally, id.*, §§ 342-344. The use of the term "*almost* insurmountable presumption," in the words of Judge Magill, "suggests that it is at least theoretically possible, although difficult, to rebut this presumption" and one "challenging" the presumption "should have the burden of presenting evidence, which, at a minimum, clearly and convincingly demonstrates that Congress intended to maintain tribal governance over ceded lands. . . . " App. 47, n.29.

ammunition, food, clothing and so on, critical to their existence. *See* T 53-54, JA 587-588. Thus, Professor Hoover testified:

> [T]here was a belief in the tribe that it's plausible that the government might shut these [annuities] down if we resist, because the resistance had led to the loss of annuities in the past. . . . [T]hat would have been disastrous.

T 54-55, JA 588-589; *see also Greger*, App. 147-148. Tribal members were not only uneasy about annuities, but were also concerned about similar monetary benefits they perceived were due them under prior agreements. As the government negotiators reported to Congress, "The Indians . . . presented to us a long list of claims and grievances. They claim that they had not received their dues under the treaty of 1858. . . . " Negotiations at 21, JA 155. The practical difficulty before the negotiators was that if the tribal members were not given adequate assurance as to these old claims, the tribal members might well have refused to sign the agreement. For example, tribal member Henry Selwyn stated: "In two previous treaties the entire payment has not been made, and that is the way this would probably be. Until all things are carried out and straightened up this land should not be sold." *Id.* at 55, JA 226. Tribal member Jumping Thunder stated, "Among these propositions are many claims. When these claims are settled, then it will be time to consider the sale of the lands." *Id.* 59, JA 241. *See also id.* at 58, JA 237 (Chief Jandran).

Article XVIII protected the tribal members against a "disastrous" loss of annuities due them for 50 years under the treaty of 1858 and, by answering the claims of the tribal members about other monetary claims, persuaded them to sign the 1892 Agreement. The state supreme court, in rejecting an over-broad construction of Article XVIII, stated that,

> the record of negotiations is replete with Yankton concerns for obtaining unsatisfied monetary entitlements before selling their unallotted reservation land. Nevertheless . . . *no mention is found respecting the preservation of reservation boundaries*, keeping a tribal presence on ceded lands, or extending Indian dominion over white settlements, except with respect to the prohibition on the sale of liquor as discussed in *Perrin*.

Greger, App. 149, (emphasis added).[13]

B. Because the text of Article XVIII is internally ambiguous, it cannot overcome the "almost insurmountable presumption" of disestablishment.

Article XVIII is internally ambiguous and, for that reason alone, cannot overcome the "almost insurmountable presumption" of disestablishment. Article XVIII states that nothing in the agreement "shall be construed to abrogate the treaty of April 19th, 1858," and *also* that the "annuities under the said treaty of April 19th, 1858" shall remain in effect. App. 120. The section is inconsistent as to what is preserved; i.e., if the language were actually intended to protect *all* provisions of the Treaty of 1858 from abrogation, certainly the 1858 annuities would be protected.

Additional ambiguity arises if a literalistic interpretation of the first portion of the savings section is adopted, for such an interpretation would effectively negate the 1892 agreement. Article 4 of the 1858 treaty guaranteed the Tribe "quiet and peaceable possession" of 400,000 acres "for their future home." App. 102. Article 10 of the 1858 agreement excluded settlement by any "white person" on the reservation, except certain narrow categories. *Id.* at 108. Under a literalistic interpretation of the first portion of the 1894 savings clause, the entirety of the 1858

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[13] We also note that the validity of Article XVI of the 1894 Act, App. 119-120, relating to Pipestone was litigated in this Court in *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926).

Treaty remains in effect, the cession of land provided for by Articles I and II of the 1894 Act would be negated and no settlers would be able to reside in the 1858 boundaries. As the Dissent found:

> No one, including the district court, any party or amici, or the majority, suggest that we interpret Article XVIII literally, because to do so would eviscerate the 1894 Act, nullifying its chief provisions and contradicting its entire purpose.

App. 51 (footnote omitted).

The Tribe, to solve this difficulty, seeks refuge in a canon of construction favoring Indian tribes. The canon relied on, however, does not allow an ambiguous Article XVIII to overcome the clear provisions of Articles I and II. In *DeCoteau v. District County Court*, 420 U.S. at 447, this Court stated:

> A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

This Court has definitively established that "cession and sum certain" language identical to that used in the 1894 Yankton agreement constitutes a clear and unequivocal expression of intent to disestablish. *See, e.g., Solem*, 465 U.S. at 470-71; *DeCoteau*, 420 U.S. at 445-47. The attempt to use the ambiguous language of Article XVIII to overcome the "clear expression of tribal and congressional intent" created by the "cession and sum certain" language is contrary to *Solem* and *DeCoteau*. *See also Rice v. Rehner*, 463 U.S. 713, 732 (1983) (canon should not be employed to accomplish "formalistic disregard of congressional intent").[14]

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[14] To the extent, however, that the canon *does* apply, it appears certain that the 1894 Congress would have perceived that disestablishment would be a "benefit" to the Indians; therefore the canon operates in favor of disestablishment.

C. There is no basis for an argument that tribal members somehow "understood" that Article XVIII would narrow the ordinary meaning of cession and sum certain language so as to preserve the boundaries of their reservation.

The United States argued below that Article XVIII should be interpreted to narrow the construction of Articles I and II to allow the transfer of land to the United States for a sum certain but not to disestablish the boundaries of a reservation. This interpretation is offered, according to the United States, to protect the "tribe's understanding" of Article XVIII. *See* Brief of the United States as Amicus Curiae in Support of Plaintiffs-Appellees, p. 9. No evidence has been cited, however, to support this rendition of the "tribe's understanding" of Article XVIII.

Furthermore, reading Article XVIII to allow the cession of lands for a sum certain without altering reservation status would be *precisely contrary* to the common understanding of the day. In *Solem*, 465 U.S. at 468, this Court stated:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.

The common understanding and practice, in fact, were to the contrary: When Indian lands passed from tribal ownership, they ceased to be part of a reservation. *See, e.g., id.; Bates v. Clark*, 95 U.S. 204, 208 (1877). To sustain the remarkable argument that the tribal members and the

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Negonsott v. Samuels, 507 U.S. 99, 110 (1993). *See generally*, Cohen, *Handbook of Federal Indian Law* 78 (1942): ("The process of allotment and civilization was deemed as important for Indian welfare as for the welfare of non-Indians"); Prucha, II The Great Father 631 (1984): ("[I]n the end the reservations became an abomination" to reformers and their friends in government).

United States somehow came to an agreement, sub silentio, that Article XVIII would upset the common understanding that reservation status of Indian lands was coextensive with tribal ownership would obviously require extensive evidence; none has been offered and the argument should be rejected.[15]

D. This Court's treatment of savings clauses indicates that even if the Article XVIII savings clause is found not to be ambiguous, it should not be given overreaching effect.

This Court has manifested its intent that savings clauses be given only limited effect in cases which acknowledge diminishment, albeit without citing the savings clause language. The Dissent thus noted that this Court has "found diminishment despite similarly 'strong' – if less verbose – savings clauses in two other allotment-era statutes." Dissent, App. 50, n.31. An Agreement with the Crow Tribe states: "all the existing provisions of May seventh, eighteen hundred and sixty-eight, shall continue in force." 22 Stat. 42 (1882). This language is *stronger* than that of the Yankton agreement for it contains no internal ambiguity. Nonetheless, this Court, in *Montana v. United States*, 450 U.S. 544, 548 (1981), referred to the Act as one of four which "reduced the reservation to slightly fewer than 2.3 million acres." Likewise, at *id.*, and *DeCoteau*, 420 U.S. at 439, n.22, this Court noted diminishment with

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[15] We do not argue that this common understanding dictates disestablishment in every case in which there was a transfer of tribal lands. In *Solem* itself disestablishment was not found. *Solem* is easily distinguishable from this case in that there was no "cession and sum certain language" creating the "almost insurmountable presumption" nor was there an unequivocal assumption of jurisdiction on the part of the State following the opening act. Nonetheless, the identification of the understanding creates a factor which presumably must be weighed in the balance in each case. See also, Brief of Amici States of California, et al., in Support of Petitioner.

regard to another Crow Agreement found at 26 Stat. 989, 1039, 1042, § 31, Act of March 3, 1891, which stated:

> That all existing provisions of the treaty of May seventh, Anno Domini eighteen hundred and sixty-eight, and the agreement approved by act of Congress dated April eleventh, eighteen hundred and eighty-two, shall continue in force.

This language is again *stronger* than that included in the ambiguous Article XVIII. This Court nonetheless acknowledged that the agreement diminished the Crow Reservation. While neither *Montana* nor *DeCoteau* directly set forth the savings language of the two agreements, this Court's opinions indicate their minimal importance.

Furthermore, we note that this Court has never failed to find diminishment because of a savings clause; indeed, when savings clauses *are* present, and diminishment *is not* found, the savings clause has not been held by this Court to have made any difference. *See, e.g., Solem, supra*; 35 Stat. 460 (1908) § 9.

Ordinary principles of statutory construction also direct that Article XVIII be given limited effect. All admit that a literalistic meaning may not be assigned to Article XVIII; therefore a court must look " 'beyond the words to the purpose of the act.' " *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). Similarly, the courts must seek a " 'sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.' " *United States v. Granderson*, 511 U.S. 39, 56 (1994). Here the "purpose" of the act and the "sensible" construction are evident: Congress meant its "cession and sum certain" language to mean what it had always meant – nothing in the history indicates a different result; the savings clause is sensibly interpreted to protect annuities. *See also*, Dissent, App. 53-54.

This interpretation also gives credit to the precept that "a specific provision [in a contract] controls over a general one," *Greger*, App. 150, *citing Bock v. Perkins*, 139 U.S. 628, 634 (1891) and the similar rule that a "broad construction" of a "proviso" in an act of the legislature

will not be allowed when it is "plainly repugnant to the body of the Act." *Dollar Savings Bank v. United States*, 86 U.S. 227, 236 (1873).

The South Dakota Supreme Court resolved the statutory interpretation problem consistent with the foregoing when it found that because a definitive intent is expressed by the "cession and sum certain" language and because Article XVIII "only generally asserts the preeminence of the 1858 Treaty and in no way disavows the purpose of divestiture in Articles I and II," Articles I and II must prevail. *State v. Greger*, App. 150.

III. THE EVENTS SURROUNDING PASSAGE OF THE ACT FURTHER SUPPORT THE PRESUMPTION OF DISESTABLISHMENT.

This Court has indicated that disestablishment may be found even when the actual language used by Congress does not itself effect disestablishment. In *Solem*, 465 U.S. at 471, this Court stated:

> [E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation. . . .

The issue *here*, of course, is not whether it should be concluded from contemporaneous evidence *alone* that disestablishment has occurred; rather, it is whether this history overcomes the "almost insurmountable presumption of disestablishment" created by "cession and sum certain

language." It does not. The history strongly supports disestablishment.

A. The on-the-record exchanges between tribal members and the government negotiators support disestablishment.

Commentary by the negotiators strongly indicate disestablishment. For example, Commissioner Cole told the tribal members during the negotiations:

> *The reservation alone proclaims the old time and the old conditions.* But even here the means of your former mode of life have vanquished [sic]. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. *To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.*

Negotiations at 81, JA 309. Similarly, Dr. Brown said: "The time is past when you could stay in your present condition. I think I shall live to see many Indian men occupy prominent places, not only in the State, but in the nation." *Id.* at 68, JA 267. Other commentary also pointed to the end of tribal governance:

> It might be, after you sold your land, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State.

Id. at 48, JA 206. *See also id.* at 49, 50, JA 208-209, 211 (Commissioner Cole); *id.* at 67, JA 266 (Commissioner Brown).

A similar recognition that the agreement intended the disestablishment of the reservation is found in the equation of the pending agreement with the 1858 Treaty by which the Tribe ceded all authority over 11 million acres of land. For example, tribal member William Bean,

Further, a 1969 Solicitor's opinion, relying in part on *DeMarrias v. South Dakota*, 319 F.2d 845 (8th Cir. 1963), which had found that the Sisseton Reservation disestablished, stated that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Exh. 628, JA 525. No reference was made to the 1941 Cohen letter.

In 1985, as set forth above, the Department of Justice admitted that the reservation had been "diminished" in a brief filed with the Eighth Circuit Court of Appeals. In 1994, the BIA (again) and the EPA both virtually admitted disestablishment of the reservation. In that year, the EPA, in issuing its "Notice of Tentative Determination" stated:

> On review of the arguments and consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894. *See Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980).

59 Fed. Reg. 16649 (April 7, 1994), JA 532-533. (The EPA reversed itself only *after* the decision below.)

3. Treatment in federal legislation.

Language used in legislation was admittedly not consistent. For example, 35 Stat. 808, March 3, 1909, referred to an allotment of 80 acres of land "on the *former* Yankton reservation in South Dakota." (Emphasis added.) Other legislation occasionally referred to a "reservation" but apparently as a convenient geographical description and not as a political description, as one speaks of the "Northwest Territory." *Cf. United States v. Oklahoma Gas and Electric Company*, 318 U.S. 206, 216 (1943). *See*, App. 35.[24] In any event, as this Court has

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[24] The divided panel apparently perceived that the most relevant legislation was found at 29 Stat. 16 (1896). *See* App. 32. The panel thought it important that Section 1 of that Act referred to the "Yankton Reservation" and Section 3 referred to "any former Indian reservation" in the state. The panel's opinion that the distinction between the two sections is meaningful is based on an incomplete analysis. First, the panel failed to recognize that Section 3 constituted a Senate amendment to the original bill. 28 Cong. Rec. 1630 (Feb. 13, 1896). Rep. Lacey stated that the amendments "include some additional reservations in the State of South Dakota, where the situation is *substantially the same* as the one covered by the House bill." 28 Cong. Rec. 1750 (Feb. 15, 1896). The only "reservations" the remark could have referred to were the Lake Traverse Reservation and the Great Sioux Reservation, *each of which had been earlier diminished. See DeCoteau, supra; Rosebud*, 430 U.S. at 589. Yankton, as the Representative perceived, was in *"substantially the same"* situation as the two diminished or disestablished reservations. *See also* 28 Cong. Rec. 1087 (Sen. Pettigrew refers to Yankton lands as "public lands of South Dakota"). Finally, the divided panel slighted the significance of the report of S.W. Lamoreaux, the Commissioner of Public Lands, which was included in H.R. Rep. 100, 54th Cong., 1st Sess. 2, Exh. 611, JA 462, stating that the "lands in the *former* Yankton Indian Reservation were opened to settlement and entry on May 21, 1895. . . . " (emphasis added).

found in other disestablishment cases, the " 'views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Hagen*, 510 U.S. at 420.

4. Neither of the tribal constitutions claims reservation status.

The tribal constitution adopted in 1932 does not assert jurisdiction over any land base, Exh. 651, JA 483-488, and members of the tribal council could be from any part of Charles Mix County, *id.*, JA 484, although the 1858 reservation includes only *one-half* of the county.

Likewise, the 1962 tribal constitution, adopted after studies of other tribal constitutions, T 205-207, JA 637-638, failed to claim jurisdiction over all lands within a defined reservation boundary. Instead, Article V, Section 1 of the 1962 constitution states:

> The territory under which this Constitution shall exist shall extend to *all original Tribal lands now owned by the Tribe* under the Treaty of 1858.

Exh. 652, JA 499 (emphasis added). Thus the Tribe in the constitution by which it is governed today has carefully limited its jurisdiction to "original tribal lands now owned by the Tribe" only, and *does not claim jurisdiction over any other lands whatsoever or over the 1858 reservation boundaries.*[25]

As a result, this Court is now asked to declare the existence of a reservation status which the Tribe has not claimed even in its own constitution.

5. No tribal government of general jurisdiction.

The Tribe's recognition of its lack of reservation status is also reflected in its historic lack of a government of general jurisdiction.

In 1892 federal authorities caused a speaking council to be developed whose actions had to be approved by the Commissioner of Indian Affairs and the Yankton agent. *See* T 124-126, JA 626-627. No evidence was offered of any action ever taken by it, however, or by any other committee which

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[25] The Yankton constitution stands in stark contrast to those of other South Dakota tribes which have opposed disestablishment. In *DeCoteau*, 420 U.S. at 443, the Sisseton Tribe relied upon a tribal constitution adopted in 1966 which claimed jurisdiction over lands "lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867." *See also Rosebud*, 430 U.S. at 616, n.1 (Marshall, J. dissenting). The Court ultimately rejected claims that the Sisseton and Rosebud reservations still existed in the disputed areas, despite the language of these constitutional provisions. *See also*, examples of claims of other South Dakota tribes to reservation boundaries, in Fay, *Charter, Constitutions and By-Laws of the Indian Tribes of North America, Part I: The Sioux Tribes of South Dakota*, Colorado State College, Museum of Anthropology (1967): (Lower Brule, p. 39; Oglala Sioux, p. 48; Standing Rock, p. 94).

it might in turn have formed. *Id.* Further, there was apparently no operating tribal business committee, the central governmental unit of the Tribe, between 1903 and 1934. T 127-131, JA 627-630.

Accordingly, in 1932, approximately 280 tribal members signed a letter to a congressional investigating committee which stated:

> Our allotment rolls were closed in 1894. Therefore all Indians 38 years old or less got no allotments and never will get any as no land is available. Our Boarding school was closed about 20 years ago. Our children attend public school. We have no hospital, never did. We have no tribal funds. Our rolls were closed in 1920. . . . We had no Tribal Council in the 75 years of our establishment and today, when our reservation is reduced to A MILE SQUARE, we do not need a Tribal Council.

Exh. 23, JA 489-490 (emphasis in original). *See also* identifying the reservation as a mile square, Exh. 623, JA 478. Nonetheless, the tribal constitution of 1932 did permit the selection of a business committee, but, as the district court found,

> the Business and Claims Committee was suspended from 1936 through 1965 and did not operate during that time, although two or three other limited purpose committees were developed by tribal members.

DCO, App. 87. The Tribe actually took few actions even on trust land after 1965 and did not attempt to exercise jurisdiction over nontrust lands. The court of appeals found at App. 39 that:

> The tribe presented no evidence that it has attempted until recently to exercise civil, regulatory or criminal jurisdiction over nontrust lands.

6. The tribal chairman recently acknowledged disestablishment.

The tribal chairman acknowledged disestablishment when, at the administrative hearing on the landfill which gave rise to this controversy he testified:

> Q. (By Mr. Abourezk): Are you familiar with the *former boundaries* before that area was opened up of the Yankton Sioux Reservation?
> A. (By Mr. Drapeau): Yes.
> Q. Was that land within the *former boundaries* of the Yankton Sioux Reservation?
> A. Yes.

Exh. 675, p 556 (emphasis added). Chairman Drapeau's subsequent trial explanation of his answers to these questions was muddled indeed. *See* T 306-313, JA 646-652. In any event, the testimony demonstrates that the tribal chairman and the Tribe's lawyer were freely using the term "former boundaries" as late as 1993, consistent with an acceptance of disestablishment. This admission is further supported by the testimony of the tribal chairman that the Tribe had posted *no* signs on highways to tell a visitor where the purported boundary to the reservation existed. *See* T 339, JA 674. (The Tribe did, however, have signs telling people how to get to its casino. *Id.*)

C. The demographics of the area confirm disestablishment.

The key post-act demographic indicators – land ownership and population – each confirm disestablishment. *See Hagen*, 510 U.S. at 421-422. The court of claims found in *Yankton Sioux Tribe*, 623 F.2d at 171 that:

> Settlement [of the ceded lands] proceeded at a rapid pace. In the 75½ [sic] months remaining of the year 1895, over 56,000 acres were taken up by settlors [sic]. In 1896, over 13,000 additional acres were taken up, and in 1897, over 35,000 acres were taken up. Thus, over 100,000 acres were taken up in the first 3 years.

Furthermore, although the Indians had initially retained allotments of over 200,000 acres, that number also declined precipitously. As Albert Kneale reported in 1913,

> [T]hese Indians were originally allotted over 200,000 acres of land and that to-day they possess less than one-third of their original holdings . . . 1800 of them to-day hold about 70,000 acres of land. . . .

Exh. 22, JA 475-476. By 1930, tribal members owned only 43,358 acres. *Greger*, App. 156. As of the time of trial, approximately 91 percent of the land was privately owned: Only about 40,000 acres of the original 430,000 acres, or about nine percent, is now trust land. *See* T 645, JA 685; App. 42, n.25. *See also* BIA map at App. 159. Furthermore, there are now six state-chartered municipalities within the area claimed to be a reservation: Wagner, Lake Andes, Pickstown, Dante, Marty, and Ravinia. T 682, JA 695-696. *See* Merits Brief of Cities of Dante, et al.

Tribal population also greatly declined in proportion to non-Indians. The district court found at DCO 86,

> White settlers rapidly entered and settled the opened areas of the reservation. Census data show that the population of Charles Mix County increased by 103.4 percent between 1890 and 1900, and of the 8,498 persons residing in Charles Mix County in 1900, only 1,483 were Indian.

As of the 1990 census, approximately 68 percent of those residing in the area of the former reservation were non-Indian. Exh. 614, JA 527. *See* n.6, infra. Thus, both the land ownership and population of the newly disputed area are clearly non-Indian.

D. The justifiable expectations of the residents of the area would be honored by a finding of disestablishment.

The century long jurisdictional history described above, together with the land ownership and population patterns, support a finding of disestablishment because "the contrary

conclusion would seriously disrupt the justifiable expectations of people living in the area." *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 603-605.

CONCLUSION

The decision below should be reversed and this Court should find that the area has lost "reservation" status pursuant to 18 U.S.C. § 1151(a), and that the only "Indian country" remaining in the area is found in the unextinguished allotments, 18 U.S.C. § 1151(c), and "dependent Indian communities." 18 U.S.C. § 1151(b).

Respectfully submitted,

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RESPONDENT'S

BRIEF

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

Respondent, Southern Missouri Waste Management District (District) in support of Petitioner, State of South Dakota (State), adopts the "Question Presented," "Decisions Below," "Statement of Jurisdiction," and "Constitution and Statutory Provisions Involved," set forth in the Brief for Petitioner. Sup. Ct. R. 24.2.

STATEMENT OF THE CASE

The District concurs in the "Statement of the Case" submitted by the State, but adds the following to illustrate the dramatic change in the status quo effected by the decisions below which hold that the Yankton Sioux Reservation has not been disestablished.

In late 1991 and early 1992, representatives of Charles Mix and Douglas counties, the Yankton Sioux Tribe (Tribe) and various municipalities began to meet in order to discuss significant new state and new federal regulatory criteria for solid waste landfills. Tr. at 573, *Yankton Sioux v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995). The federal requirements, developed by the Environmental Protection Agency (EPA) pursuant to the Resource Conservation and Recovery Act (RCRA), amended existing rules to include new criteria for siting, designing and operating solid waste facilities. 40 CFR pt. 258.

In February, 1992, a non-profit entity entitled Southern Missouri Waste Management Association, Inc. was incorporated to deal with the challenge of the new requirements. District Court Opinion (DCO), Pet. App. at 90. According to the district court, "tribal members regularly attended Southern Missouri's meetings" although the Tribe "did not sign the joint powers agreement or become an official member of the organization." *Id.* Nonetheless, the testimony indicated that a tribal representative was a voting member of the District Board, Tr. at 581-582, 640-641, JA at 682 and that a tribal councilman occasionally at-

tended. *Id.* at 640-641. A former chairman of the District perceived at the time that the Tribe was, in fact, a member. *Id.* at 640, 660. *See also id.* at 581.

The District aggressively sought out various sites for the landfill and, indeed, advertised in an effort to seek sellers of property. Tr. at 637-638. After conferences with its engineers, as well as the South Dakota Department of Environment and Natural Resources (DENR), the District selected as a site non-Indian fee land approximately one and one-half miles west of Lake Andes, South Dakota. The testimony at trial indicated that the tribal member present at the Southern Missouri meeting voted in favor of the proposed site, or at least did not oppose the site. Tr. at 581-582, 589-590, JA at 683. The site selection was reviewed with the tribal chairman, who stated that he did not want the site on nearby trust land but made no objection to the site actually selected on the grounds that it was within a "reservation." Tr. at 636-637. The site was within the 1858 boundaries of the Yankton Sioux Reservation, a factor not deemed important or material at the time.

After a site characterization study was completed, the site was found to be environmentally suitable and the District submitted a formal request to DENR for a solid waste permit in order to construct and operate the landfill. DCO, Pet. App. at 91. Further, at about the same time as the study was completed, the District approved membership in the District of two additional neighboring counties —Gregory County, South Dakota and Bon Homme County, South Dakota. Tr. at 579-580. The greater size of the District promised to make the facility more affordable to the rural population it was meant to serve.

In the latter part of 1993, after a general tribal election and a change in the tribal administration, the attitude of the new leadership of the Tribe toward the merits of the landfill changed radically.[1] In early October, 1993,

[1] Throughout the 1980's and the 1990's, voter participation in tribal elections fluctuated substantially. Sometimes fewer than 600 people participated in the tribal process. More recently, voter turnout has leveled out at around 1,000 (tribal voters need not reside in the area). In general, approximately 90% of the area within the 1858 boundaries is non-Indian owned and over two-thirds of the population is non-Indian.

the Tribe petitioned to intervene in the contested case hearing procedure with regard to the landfill permit. The Tribe's Petition was granted, and the Tribe was allowed "party status" in the hearing. Tr. at 91.[2]

A four-day contested case hearing was held before the South Dakota Department of Minerals and Environment on December 8-10 and 20, 1993. DCO, Pet. App. at 91. It is critical to note that at this time the Tribe opposed the landfill on environmental grounds but did *not* oppose it on jurisdictional grounds *nor* on the grounds that it was planned within a reservation. The colloquy between tribal chairman and the tribal attorney, in December of 1993, in fact, referred to "*former* boundaries" of the reservation. According to the testimony:

> Q: (By Mr. Abourezk, the Tribe's Attorney): Are you familiar with the *former boundaries* before that area was opened up, of the Yankton Sioux Reservation?
>
> A: (By Tribal Chairman Drapeau): Yes.
>
> Q: Was that land within the *former boundaries* of the Yankton Sioux Reservation?
>
> A: Yes.

Ex. 675, Administrative Record before the South Dakota Board of Minerals and Environment, Drapeau Testimony at 556 (emphasis added).[3]

[2] Consistent with RCRA's authority to delegate environmental programs to states (Subtitle D of RCRA) the State sought to implement the new requirements and therefore revised statutes and rules to do so. EPA generally approved the State's program on October 8, 1993, thereby authorizing the State to implement and enforce the requirements of 40 CFR pt. 258. Plaintiff's Exhibit 3. *See* generally Tr. at 573. In the same notice, EPA reserved the delegation question on "'existing or former' Indian reservations." 58 Fed. Reg. 52488 (Oct. 3, 1993), JA at 530.

[3] The tribal chairman's subsequent effort to explain this testimony was unconvincing. Tr. at 306-313, JA at 645-652.

The Board granted the permit in December, 1993. Following the Board's decision, a second group represented by Mr. Abourezk (the Tribe's attorney) filed an appeal to state circuit court alleging an abuse of discretion on the part of the Board in granting the permit. *See* Pet. App. at 93. No jurisdictional issue was raised. The Sixth Judicial Circuit Court for the State of South Dakota ultimately affirmed the Board decision, and no appeal was taken to the South Dakota Supreme Court. *Id.* The Tribe did not participate in the circuit court appeal.

Federal regulators continued to recognize that the original reservation had been disestablished well into 1994. Thus, on April 7, 1994, EPA issued its Tentative Determination, based on consultation with the Department of the Interior, on whether the State would be granted RCRA authority with regard to the former Yankton Reservation. According to EPA:

> On review of the arguments presented and following consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was *disestablished* by the Act of 1894.

59 Fed. Reg. 16649 (April 7, 1994), JA at 532 (emphasis added).[4] The Tribe's arguments with regard to reservation status had thus been raised for the first time in the process before EPA.

Having failed to convince EPA and, apparently, the Department of the Interior, of the existence of the reservation, the Tribe, in September, 1994, filed a complaint in federal district court. In the complaint, the Tribe alleged that the Yankton Sioux Reservation remained intact and had not been disestablished by the 1894 Act, *contrary* to nearly a century of state and federal precedent.

In essence, the Tribe contended that, based on the status of the area as a "reservation," the State did not

[4] EPA reversed its position with regard to reservation status only after the district court's decision. *See* 61 Fed. Reg. 48684-48685 (Sept. 16, 1996).

have authority to issue the District a "Subtitle D" landfill permit and that the Tribe had jurisdiction over the site. At this point, the District sued the States, on a third party complaint, requiring it to defend its jurisdiction as to the solid waste permit that the District had obtained from the State. The State waived its Eleventh Amendment privilege and participated fully in all the proceedings at bar.

The district court, after trial, found that Congress had not disestablished or diminished the boundaries of the Yankton Reservation. Pet. App. at 96. The district court additionally found that, in this instance, the Tribe had failed to demonstrate the existence of either of the Montana exceptions, *Montana v. United States*, 450 U.S. 544, 565-566 (1981), and so could not regulate the landfill itself.

The district court also found that, because EPA had not delegated federal authority to the State with regard to "Indian country" and because the proposed landfill was now newly defined as within "Indian country," EPA regulations applied. The district court found further that the federal regulations required the installation of a very expensive (1.75 million dollars) "composite liner." *See* DCO Pet. App. at 96.[5]

The State appealed the disestablishment/diminishment issue to the Eighth Circuit Court of Appeals. A divided panel affirmed the district court on this issue. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996). Pet. App. at 1. (The District did not appeal because the district court allowed

[5] The District later petitioned EPA to waive the liner requirement. On June 6, 1996, EPA granted the District's petition. The District thereafter sought and obtained relief from the federal court order with regard to the liner based upon EPA's determination. This relief was granted on December 11, 1996. The Tribe has separately sued EPA arguing that it lacked legal authority to grant the waiver; the district court ruled in favor of EPA on December 11, 1996, on that issue. The Tribe has appealed both of these decisions to the Court of Appeals for the Eighth Circuit.

it to go forward with the construction of the proposed landfill facility.)[6]

Further, the decisions of the federal courts present a very difficult situation for the District. Both the State and the Tribe have applied for delegation of federal RCRA authority with regard to the area within the 1858 boundaries of the Yankton reservation. EPA denied RCRA authority delegation to the State after, and based upon, the district court decision. *See* 61 Fed. Reg. 48684-48685 (Sept. 16, 1996). Even though the Tribe has been found by the federal district court to *lack* the authority under *Montana* to regulate the facility as a matter of tribal law, it is by no means certain that the federal government will not delegate *federal* authority to the Tribe, resulting in even further litigation.[7] *But see, Backcountry Against Dumps v. E.P.A.*, 100 F.3d 147 (D.C. Cir. 1996).

Thus, in the place of a well-defined system in which the State was able to grant all of the necessary permits, and would certainly have been delegated federal authority with regard to this area and this landfill, a confused and difficult situation has resulted for the District.

Lastly, the panel majority decision would adversely impact environmental protection in the area generally. EPA has no regulatory machinery in existence with which to grant permits to operate a Subtitle D landfill. Although the landfill would be required to comply with EPA criteria set forth in 40 CFR 258, the *only* entity with jurisdiction

[6] The District expected that the district court would be reversed on the disestablishment issue in light of the strength of the precedent from this Court, the Eighth Circuit Court of Appeals, and the South Dakota Supreme Court. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-604 (1977), "the single most salient fact is the unquestioned actual assumption of state jurisdiction." The District files this brief in support of the State because the district court was affirmed on the disestablishment issue and because of the likelihood that the assertion of tribal jurisdiction will continue to affect the District in this or similar contexts.

[7] The State continues to assert its inherent jurisdiction over the District; to what degree that authority will be challenged in the future is unknown.

to enforce those provisions would be a federal court through a citizen lawsuit filed against the District pursuant to RCRA. 42 U.S.C. § 6972. Similarly, it is the District's understanding that EPA does not approve site characterization studies or sites for landfills, nor does it approve preliminary or final design plans for landfills or monitor the construction of landfills. The District also understands that EPA does not have the manpower to adequately inspect landfills. The Tribe had virtually no environmental program at the time of trial, *see* Tr. at 315-316, JA at 652-654, and had not even made an estimate of the cost of a comprehensive program. Tr. at 335, JA at 671-672. To the extent that the Tribe intends to and does successfully insert itself into the regulation of non-Indian lands, which constitute more than 90% of the area in question, the State's authority would no doubt be further clouded.[8]

SUMMARY OF ARGUMENT

The District fully supports the arguments set forth in the Brief of Petitioner, State of South Dakota. In addition, however, the District would specifically direct the attention of the Court to the legislative history of the 1894 Act, which is excerpted and summarized *infra*, at 12. A brief review of this documentation reiterates two fundamental points in further support of the Petition:

1. The decision of the court of appeals conflicts in principle with relevant decisions of this Court.

2. This case presents a question of federal law that is important and national in scope.

First, in *every* significant respect, the Yankton documentation squarely tracks the Sisseton-Wahpeton (Lake Traverse) documentation detailed at length in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Although three short years and one session of Congress separates the passage of the Sisseton-Wahpeton and the Yankton Acts, parts of the Yankton process were actually under

[8] The Tribe's intent in this regard is unknown. *See* Tr. at 320-329, JA at 656-666.

consideration in both sessions. Moreover, many of the key congressional participants in the process continued to hold office through the passage of the Yankton Act (e.g., Congressman John A. Pickler of South Dakota "same kind of a treaty we have always made," *infra* at 36-37, and Chairman of the Committee on Indian Affairs, William S. Holman). In fact, approximately *one-third* of the members in the House of Representatives and *two-thirds* of the members in the entire Senate for the 51st Congress (Sisseton-Wahpeton) were still there in the 53rd Congress when the Yankton Act was finally considered, debated and passed.

In this light, uncontested statements in the debates and reports that *specifically* reference the Sisseton-Wahpeton (Lake Traverse) documentation as *precedent* for consideration in the Yankton process assume a degree of significance that the Tribe cannot avoid. When one also considers that there is not a single reference (or even a suggestion) in the same documentation that Congress considered, much less intended, the enactment of the *radical* departure the Tribe asserts, the extent to which the decision of the court of appeals conflicts with the relevant decisions of this Court is readily apparent.

A single point serves to highlight the extent of this conflict. This is only the *second* time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the *first and only* other case with a similiar holding (when controlling law was less clear), was promptly reversed in *DeCoteau*. Since then, *DeCoteau* has been cited and relied on in all circuits as controlling precedent by every other court *except* the district court and the majority of the panel in this case. Nothing in the record in this case fairly supports a departure from this universal view, as the Dissent forcefully and succinctly attests. *See* Pet. at 9-11, 16-19, 21-22, and 24. *See also* Pet. App. at 44-64.

Secondly, the same documentation also confirms the importance of the question of federal law presented. Here,

as in the Sisseton-Wahpeton debates, Congress addressed the national scope of this and related cession legislation and its place in forming the crux of federal Indian policy in that period (1887-1900). In this instance, as in *DeCoteau*, the annual Indian department appropriation act ratified *several* other cession agreements in addition to the Yankton agreement, which further demonstrates the scope of the legislation and its relationship with similar cessions considered in *DeCoteau* (together affecting tens of millions of acres of land across the United States). *See DeCoteau*, 420 U.S. at 439, and the Act of August 15, 1894, 28 Stat. 286.[9]

To complete the perspective, at the petition stage the District has appended excerpts of the Annual Reports of the Commissioner of Indian Affairs and the Secretary of Interior for the same period. Br. of Resp. in Support Pet. App. at 1a-46a.[10] These reports unequivocally confirm that the Commissioner of Indian Affairs and the Secretary of Interior considered both the Yankton and Sisseton reservations "restored to the public domain" by the legislation in question ("*land will be restored to the public domain,*" Yankton Act, Annual Report, Commissioner of Indian Affairs (1894), JA at 450; "*restoring to the public domain,*" Yankton Act, Annual Report, Secretary of the Interior (1894-1895)). Br. of Resp. in Support Pet. App. at 23a, 43a, 44a (emphasis added). They also demonstrate the general thrust of federal Indian law policy and legislation for that period, and unmistakenly support that the conclusions this Court set forth in *DeCoteau* are applicable

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[9] This legislative history was first submitted to the Supreme Court of the State of South Dakota by Charles Mix County, South Dakota, as *Amicus Curiae* in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997). In *Greger*, the South Dakota Supreme Court reaffirmed its view that the 1894 Act disestabilshed the Yankton Sioux Reservation. *Greger* is discussed in the Petition at 12-14 and appended in the Petition Appendix at 125-158.

[10] These excerpts were first presented to this Court in the text of the Brief for Respondent (pages 72-113) and in Appendix II of Respondent in *DeCoteau*. Brief for Respondent and Appendix II for Respondent, *DeCoteau* (No. 73-1148).

to the present case. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *Hagen v. Utah*, 510 U.S. 399 (1994).

Subsequent jurisdictional history, which is essentially undisputed here, unequivocally confirms that Congress intended this cession to disestablish the 1858 Yankton reservation. The opinion in the district court and the majority and the dissenting opinions in the court of appeals are in substantial agreement on this point.

Over the years, the views of the Department of the Interior have also reflected this analysis, notwithstanding the one 1941 letter to the contrary. And even that letter was subsequently disregarded in the relevant sections of the 1942 edition of Felix Cohen's Federal Indian Law. Those sections clearly confirm that the Article XVII liquor prohibition generally supports disestablishment analysis, as this Court noted in *Rosebud*, 430 U.S. at 613-615 n.47.

ARGUMENT

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early date to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indians as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away.

Report of the Commissioner of Indian Affairs, 8 (1891), Br. of Resp. in Support Pet. App. at 27a-28a.

I. THE LEGISLATIVE HISTORY OF THE YANKTON ACT ESTABLISHES THAT THE DIVIDED PANEL UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT; THE EXTENT OF THE CONFLICT IS NOT LIMITED TO SOUTH DAKOTA OR TO THE EIGHTH CIRCUIT, IT IS NATIONAL IN SCOPE AND IT IS IMPORTANT.

A. Congress and the Yankton Sioux Tribe Did Not Intend That the Original Boundaries of the Yankton Reservation Would Remain Intact.

1. Introduction. During the "latter half of the 19th century, large sections of the Western States and Territories were set aside for Indian reservations." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). In particular, the original Yankton Sioux reservation was created in 1858 when Congress ratified a cession agreement with the Tribe, ceding other lands. Act of April 19, 1858, 11 Stat. 743. Pursuant to this cession agreement, some 430,495 acres were set aside for the exclusive use of the Yankton Sioux. *Id.* This is the 1858 Yankton reservation.

Near the end of the century, however, federal Indian policy changed. *Hagen v. Utah*, 510 U.S. at 402. Congress began to take the view that "Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." *Solem*, 465 U.S. at 466. *See also DeCoteau*, 420 U.S. at 431; *Hagen*, 510 U.S. at 402. It was felt that "individualized farming would speed the Indians' assimilation" into the American way of life. *Solem*, 465 U.S. at 466.

During this same period, many reservations were subject to certain "familiar forces" encouraging their opening. These "familiar forces" consisted predominantly of two factors. First, "[a] nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open [reservations] to

general settlement." *DeCoteau*, 420 U.S. at 431. Second, many Indians on the reservations "suffering from disease and bad harvests, developed an increasing need for cash and direct assistance." *Id.*

Ultimately, the combination of Congress' new position that Indians should settle on privately owned parcels of land and the ever-present "familiar forces" resulted in the General Allotment ("Dawes") Act of 1887. Act of Feb. 8, 1887, 24 Stat. 388. This Act was "enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands." *DeCoteau*, 420 U.S. at 432 (citing Act of February 8, 1887, c.119, 24 Stat. 388). Pursuant to this Act, the President of the United States was granted the authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to . . . [non-Indian] settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *Id.* (citation omitted).

As a result of the General Allotment Act and the Amendatory Act of February 28, 1891, parcels of land within the Yankton Sioux reservation were allotted to individual Yankton Sioux Indians. Subsequent to the allotment, approximately 168,000 acres of "surplus" land remained unallotted.

2. Legislative History. A brief review of the legislative history of the Act of August 15, 1894, 28 Stat. 286, puts this disestablishment issue in the proper historical perspective. Such a perspective establishes beyond question that the construction of this Act by the federal courts is untenable and clearly erroneous. As the Yankton documentation attests, neither Congress nor the Tribe intended that the original boundaries would remain intact.

The significant aspects of this legislative history are set forth in various disestablishment arguments submitted in the Brief of the State. However, the following chronological overview is intended to supplement those arguments by making clear that nothing in the entire history of this process supports any other conclusion. To the

contrary, viewed in perspective, every source confirms that the intent of Congress and the Tribe, in all significant respects, tracks the views set forth by this Court in *DeCoteau*. In *DeCoteau*, this Court was presented with a contemporaneous and nearly identical 1891 Sisseton-Wahpeton (Lake Traverse) Act and held that it had disestablished that reservation. *DeCoteau* is controlling here. *See also Rosebud*, 430 U.S. 584.

(a) The Negotiations. The history of the negotiations for the cession of the surplus lands of the Yankton Sioux reservation follows the same general pattern found throughout the west in the latter part of the Nineteenth Century. Established as a result of an extensive 1858 cession, the Yankton reservation itself was soon subject to the familiar forces noted in *DeCoteau*. In the early 1880's, this process was initially set in motion by the United States. In 1884, the first Commission was sent to the Yankton reservation to negotiate for a cession. Report of the Yankton Indian Commission dated March 31, 1893, S. Ex. Doc. No. 27, 53d Cong., 2d Sess. at 12-13 (1894), JA at 134-138. These 1884 negotiations were unsuccessful. *Id.* After the passage of the General Allotment Act, applicable throughout the United States, efforts for negotiations were renewed. *DeCoteau*, 420 U.S. at 434 (discussing Section 5 of the General Allotment Act).

In 1889, the South Dakota legislature passed a Memorial to Congress in support of "the opening to settlement under the 'Homestead law' of the Yankton reservation." South Dakota H.R.J. Res. 183, Special Sess. (1889).[11] This Memorial was presented in Congress and referred to the respective committees on Indian affairs. 21 Cong. Rec. 1753, 51st Cong., 1st Sess. (1890). Significantly, similar actions predated the passage of the *DeCoteau* legislation. *DeCoteau*, 420 U.S. at 431-432 n.8.

According to the Commissioners finally appointed to conduct the negotiations, the Yankton Sioux tribe itself

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[11] The complete text of the South Dakota Memorial is reproduced in Br. of Resp. in Support Pet. App. at 47a-48a.

initiated the process through communications with the Secretary of the Interior. S. Ex. Doc. No. 27 at 50, 74, JA at 286, 289. In 1892, an appropriation for expenses for this purpose was approved: "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . ." Act of July 13, 1892, 27 Stat. 120, 137. In July, 1892, Commissioner of Indian Affairs J.T. Morgan issued letters of instruction to three Commissioners: Colonel J. C. Adams, Dr. W. L. Brown, and John J. Cole. Letter from Commissioner, J. T. Morgan, Department of the Interior, to Commissioners (July 27, 1892), Br. of Resp. in Support Pet. App. at 49a-51a.

In this instance, as in *DeCoteau*, the instructions are detailed and referenced throughout the Yankton documents. Commissioner Morgan put the issue squarely in the cession format:

> [T]o negotiate with the Yankton Sioux Indians for the *cession* of their surplus lands. . . .

Br. of Resp. in Supp. of Pet. App. at 49a (emphasis added).

Importantly, the Commissioner also specifically referenced allotments pursuant to the "Act of February 8, 1887" (General Allotment or "Dawes" Act) and acts amendatory thereto, "averaging over 150 acres for each member of the tribe." *Id.* at 50a. As a result of these allotments, the Commissioner noted that there should be "a surplus of some 168,000 acres." *Id.* at 49a. *See also*, Pet. App. at 9 n.9 (stating "some 200,000 acres were sold in 1894"). Further, the Commissioner instructed that:

> If they are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with.

Id. at 50a.

In addition, the text of the instructions clearly anticipated that the status of the reservation would be altered by the cession agreement:

> The surplus lands in their *present state of reservation* cannot be made to yield any considerable income, while the money which will be paid for their *relinquishment* . . . will give them an income. . . .

Br. of Resp. in Supp. of Pet. App. at 50a (emphasis added).

Also enclosed with the instructions was a "form of agreement" transmitted for "guidance," but the Commissioner specifically noted that "you are not required to adhere to the same absolutely." *Id.* at 51a. Here, as in *DeCoteau*, the instructions were general in nature. Moreover, Congress was aware of this fact. The exact point was subsequently addressed in the ratification debate on the floor of the House of Representatives in the remarks of South Dakota Representative Pickler:

> [T]he provision in this bill in relation to the treaty for the Yankton Sioux Reservation; and *what can be said of that treaty can, in general terms, be said of the others.* The proposition that is before the House to-day is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to treat with the Yankton Sioux Indians for their reservation. That commission was organized by the Secretary of the Interior and was sent out with *general instructions.*

26 Cong. Rec. 8267 (1894), JA at 419 (emphasis added).

One other aspect of the instructions is worthy of special notation. In setting forth the history of the reservation and the status of the area at that time, Commissioner of Indian Affairs, Morgan cited the Treaty of April 19, 1858, 11 Stat. 743, and noted that "the treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." Br. of Resp. in Support Pet. App. at 50a. In other words, unlike some Sioux and other treaties, which required three-fourths approval, the 1858 Treaty had no such special limitation. As a result, the provisions set forth in the General Allotment Act would control the Yankton negotiations. In this respect, a simple majority would suffice. As the Commissioner noted:

> The terms and conditions agreed upon in council should be reduced to writing and incorporated in the

> accompanying form of agreement which should be signed by at least a *majority* of the male adults of the members of the tribe.

Id. at 50a (emphasis added).

The federal district court, in an attempt to support the result reached in its memorandum opinion, *sua sponte* quoted similar language ("most importantly") (" '[t]he treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof' ") in support of the *inexplicable* proposition that the subsequent Yankton agreement of 1892 was *not* a cession. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878, 885-886 (D.S.D. 1995), Pet. App. at 82. In context, the Senate Document does not support the conclusion of the district court and the instructions make clear that the reference there, as in the instructions, was to the 1858 Treaty and the percentage of members' consent required for ratification. Presumably, the Tribe recognized this fact and did not advance or support this strained argument on appeal. The panel majority ignored this error of the district court but the dissent did not. Pet. App. at 59-60. Importantly, even in this instance, the *DeCoteau* documents track the Yankton instructions. See the word for word, identical language in the *DeCoteau* instructions ("The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof."). Cities App. at 29.

The Commission arrived at the Yankton agency in Greenwood, South Dakota on October 1, 1892. S. Ex. Doc. No. 27 at 7, JA at 122. Almost immediately, the work of the Commission was interrupted by personal problems. During the first week, Commissioner Brown was "called away, and was absent about six days," covering the period of the first council. *Id.* at 8, JA at 124. On October 10, Commissioner Cole received a telegram informing him of a fatal accident involving his oldest son, which, together with the serious illness of his wife, kept him away from the reservation until November 26, 1892. *Id.* In addition,

on October 25, Commissioner Adams returned home and was absent until November 10, 1892. *Id.*

Moreover, because of a rivalry among tribal factions, the Commissioners met with some support but more opposition. *Id.* at 8-10, JA at 112-120. As a result, the discussions continued for several months. *Id.* In the process, several councils were convened and the issue was thoroughly discussed. *Id.* The proceedings of the councils were "kept as fully and as accurately as possible." *Id.* at 8, JA at 123. At the conclusion of the council proceedings, the Commissioners attested that the written records were:

> [C]orrect in all substantial particulars and are as nearly verbatim as possible under the circumstances, and they correctly represent the council proceedings between the commissioners and the Yankton Indians. *Id.* at 97, JA at 358.

Throughout the councils, the price per acre was the dominant theme in the discussions.

> Peter St. Pierre: This is our land the price is entirely too small. . . . Tom No. 1: The people desire a high price for this land. Whatever we have we want a good price for it, no matter how small. You know that this is a very small tract of land. *Id.* at 74, JA at 287.
>
> Peter St. Pierre: I am against the sale. My friends, this land belongs to us. If the price was higher I might be willing to consider it. *Id.* at 78, JA at 299.

A summary of the council of February 18, 1893, reflected this same sentiment. *Id.* at 91, JA at 339-340.

The Commissioners were convinced that others, with "vested interest" motives, fueled the opposition. This group, according to the Commissioners, was not concerned with the price per acre:

> Commissioner Cole said: [T]hat we can not get these employe[e]s to sign the agreement? Of all the Indians employed at this agency but two have signed. Louis Claymore and one other mechanic signed,

> and all the balance are against us, the office is against us, the police office is against us, the shops are against us, the whole agency is against us and is a hotbed of opposition, so that men who come here to sign are sent away without doing so. . . . [L]ittle progress had been made in taking signatures, as the opposition, under the lead of some of the white employe[e]s of the Government, were straining every nerve to prevent the signing of the agreement. Id. at 86, 89, JA at 325, 333.

In the end, an agreement was reached with more than a majority of the adult male members of the Tribe (two hundred fifty-five (255) out of a total four hundred fifty-eight (458)). *Id.* at 94, JA at 347-348.[12] Significantly, in the process, the discussion establishes several points that are important in the resolution of the question presented here.

(1) References to Sisseton-Wahpeton (Lake Traverse) Cession. In general, this record constitutes an important source which confirms that, without exception, the substance of the process and the intended result corresponds with the *DeCoteau* process in every respect. In fact, in several instances the Commissioners and others specifically made reference to the Sisseton-Wahpeton (Lake Traverse) cession presented in *DeCoteau*:

> Henry Selwyn: If the *Sissetons* and Titowan had sold their land at the same price at which we sold ours in 1858 per acre they would have given the Government their lands for nothing. *Id.* at 54, JA at 226 (emphasis added).
>
> John Cole: They have reported that four bands of Pawnee Indians will sell their land for $1.25 per acre. *The Sisseton Reservation was purchased by the Government at $2.50 per acre.* This is the highest price which has ever been given. So you see your ideas of price are away up. *Id.* at 68, JA at 270 (emphasis added).

[12] The agreement was "translated into the Dakota language for the use and consideration of the tribe's committee. . . ." S. Ex. Doc. No. 27 at 51, JA at 213.

> John Cole: The commissioners are now ready to make you an offer for your surplus lands. The Government will pay you $600,000 for your surplus lands, amounting to about 168,000 acres; payments to be made on the terms of our instructions from the Department of the Interior. This is nearly $3.60 per acre and is more than double what the Cherokees have agreed to sell for. *It is more than the Government paid for the Sisseton Reservation* and is the highest price we have ever known the Government to offer. *Id.* at 71, JA at 278-279 (emphasis added).

(2) Cession and Related References. The manner in which all parties referred to the process in general "cession," "sale," and "treaty" terms also confirms the general understanding and further demonstrates the similarities and the purposes of the negotiations. As in *DeCoteau*, the process was not atypical. *DeCoteau*, 420 U.S. at 439 nn.21, 22. From the very beginning, the Agent, Col. Foster, the commissioners and others clearly stated:

> Col. Foster: The Government has sent a commission to you to negotiate with you for your surplus lands . . . You do not have to sell your surplus lands if you do not want to. . . . Col. Adams: [W]e also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about. . . . [A] treaty with you for your lands. . . . John J. Cole: [W]e must make this treaty . . . to sell your surplus lands . . . to sell your surplus lands . . . [T]he Government would buy your surplus lands if you want to sell them. . . . John J. Cole: [Y]ou have sent word to Secretary Noble that you desire to sell your surplus lands. . . . Henry Selwyn: This is the second time we sold land to the Government. . . . William T. Selwyn: treat for the sale of the surplus land. . . . William Bean, Sr.: Struck by the Rees has sold a great portion of our reservation . . . Jandran: selling our lands. . . . White Swan: Negotiate for the sale of these surplus lands. . . . Dr. Brown: I believe if you make this

treaty. . . . Dr. Brown: [D]ecide whether you want to sell or not . . . . John J. Cole: [T]o make this treaty between you and the Government. . . . [A] direct out-and-out sale of the whole of your surplus lands. . . . [T]o cede these surplus lands to the Government. . . . We propose to buy all these lands, good, bad and indifferent. . . . Felix Brunot: [W]hether we will sell our lands or not. . . . Eugene Brunot: [S]ell their land. . . . John Omaha: It was decided by the committee that they would sell the land. . . . John Grayface: We do not object to the provisions of the treaty, but we do not want to make a treaty at this time. S. Ex. Doc. No. 27 at 48-50, 54, 56, 58, 67, 68, 73, 91; JA at 204-205, 207, 208, 210, 211, 225, 232, 236, 237, 238, 267, 268, 269, 284, 285, 340. *See also* S. Ex. Doc. No. 27 at 50, 52, 57, 59-64, 66, 67, 69-72, 74, 75, 77-79, 83, 86-88, 93, 94.

(3) Treaty of 1858, 11 Stat. 743. All parties also made specific reference in these negotiations to the earlier 1858 Yankton cession. Of course, no one has ever questioned the effect of the 1858 cession (or any similar cession) on the reservation boundaries. A distinction between the 1858 cession and the 1892 cession in this respect cannot be documented in the transcripts of these negotiations:

Henry Selwyn: I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. We do not know how many acres we sold at that time, but we know it was many thousands of acres. I have traveled over it and know that it takes a man six days to go to the eastern line and six days to go to the western boundary. . . . [W]e have given them the best land, especially that along the James River. In two previous treaties entire payment has not been made, and that is the way this would probably be. Exh. 605 at 54, 55, JA at 225.

Peter St. Pierre: We have already sold a large tract of land and received a very small amount for it. For the sale of this small tract, we will not get enough to make us rich. *Id.* at 56, JA at 231.

William T. Selwyn: It was stated well this morning that we gained nothing by the treaty of 1858. The reason of this is because there were not enough young men educated at that time to prevent it. I think we should not in any way charge the violation of that treaty to these commissioners. I think that treaty has no connection whatever with this matter. Some will probably remember the words of this treaty. There are three of you here who were present at the council. We have Mr. Charles Picotte here who was chairman of the committee who signed the treaty. When the chiefs and chairman went on to Washington to sign the treaty, they put in these words . . . *Id.* at 57, JA at 232.

William Bean, Sr.: I am going to refer to a certain thing. Struck by the Rees has sold a great portion of our reservation. *Id.* at 58, JA at 236.

Robert Clarkson: I said at that time when they made the old treaty, they did not consider the matter, and did not know what they were doing at that time. *Id.* at 61, JA at 246.

Dr. Brown: I want to speak to you of the treaty of 1858. Now, I will give you the language of that treaty as it is given in this book, and have it interpreted: 'That the Yankton Indians by that treaty relinquish to the United States all the lands owned or claimed by them, except this reservation, which is described there as consisting of 400,000 acres . . . There were about 12,000,000 acres. This land was ceded by that treaty. . . . That treaty set aside for your people a reservation with certain boundaries which it was supposed to contain 400,000 acres. When they came to survey it, they found it had 430,405 acres in it. *Id.* at 65, 66, JA at 259.

John J. Cole: Now, exactly the reverse of this is true. The Government has not only carried out that treaty faithfully, but it has also given to you as a free gift as much as was due you under the treaty. *Id.* at 80, JA at 307.

Col. Foster: Under the treaty of 1858 you sold a vast tract of land for but little more than you

> will get under this treaty for the small amount of surplus land which you have left. *Id.* at 83, JA at 315.[13]

(4) Familiar Forces and The General Allotment Act. The familiar forces noted in *DeCoteau* are also reflected in the Yankton councils:

> John J. Cole: The Great White Father . . . wants you to sell your surplus lands for which you have no use. If you want to sell these surplus lands we will buy them and pay you all they are worth, and the Government will sell them to men who will make homes on them and will build good houses and make good farms, and this will make your other lands—your homes—more valuable, so that the lands you have left will be worth more than all your lands are now worth, and what you get from the Government for the surplus lands will be a clear gain to you.
>
> The buffalo is gone, the antelope is gone, you can no longer live by hunting. You must plow like the white man; you must raise cattle to take the place of the buffalo; you must raise sheep to take the place of the antelope. You must raise wheat and corn and oats to make bread and to feed your stock. You must raise everything which the white man

[13] In one other instance specific reference was made to the Treaty of 1858. During the council of Saturday, January 21, 1893, Commissioner Cole, in noting that Secretary of the Interior Noble had "fully approved the agreement with suggested changes," Commissioner Cole also referred to having submitted the agreement to the Yankton missionaries for their comments. In that connection, he caused a letter to be read into the record from missionary John P. Williamson. Mr. Williamson, after noting that he believed the "terms of this agreement are the most liberal that could be granted," and that he had "no doubt that the stipulations would all be faithfully carried out," concluded:

> And further, there is no cause for apprehension that this agreement will, in any way, interfere with the treaty of 1858. Exh. 605 at 84, JA at 318.

In context, this language referencing, in a general way the Treaty of 1858, does not support the continued existence of original reservation boundaries.

> raises, and have plenty to eat and plenty to sell. Then you can build good houses where you can keep warm and dry, and be comfortable. You can wear good warm clothes and have many comforts that will make you happy. (How!)
>
> In the old times. . . . Now you can live in peace with your women and children and have plenty. *Id.* at 49, JA at 209.
>
> John J. Cole: Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. . . . They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable. *Id.* at 50, JA at 211.
>
> Dr. Brown: I believe if you make this treaty you will be able to build better houses, you can have better clothes and better horses, and be in every way better off. The time is past when you could stay in your present condition. *Id.* at 67-68, JA at 267.
>
> Col. Adams: He was placed on a reservation that he might learn what a home was. After a while the Government allotted him land on which to build him a home, to raise crops, that he might learn how much better it is to have one and provide for the long, cold winters. When the Government found how well the Indian liked to have a place called home she sent men like the members of this commission to buy the land the Indians did not want, that the white man might come in and settle near them so the Indian might see how they did and learn all about how to make a home and become like white men, who work to get money to make themselves and families better, to make them wise, to give them more knowledge, to keep disease from their bodies, and how to take care of their bodies. *Id.* at 71-72, JA at 279-280.

John J. Cole: Forty years ago this plain was covered with buffalo; there were deer and antelope and other wild game. Now I want you to show me where there is a buffalo. You might, perhaps, show me one single deer, but not game enough to live upon. You can not live forty years ago. There are some here who were living then, but they can not live over that time, and the conditions now are totally different from what they were then. *Id.* at 74, JA at 288.

John J. Cole: You people signified to the Great Father that you wanted to sell your land. He did not send this commission to treat for the sale of your land until he understood that you wanted to sell. He did not send this commission until every one of you had a farm allotted, every man, woman, and child. So that every one of you, down to the smallest baby, has a home of their own on this reservation. *Id.* at 74-75, JA at 289.

John J. Cole: You have been a great people; you have been a powerful people. You have felt your superiority and have held yourselves above other people around you. As huntsmen you were fleet of foot and sure of aim. As warriors you were brave and feared no enemy. To be a Sioux was an honor, and you were proud of your name and your fame. Thus was it with your fathers.

But conditions have changed, the country has changed from what it was when your fathers lived here. Then the forest and plains were wild and unbroken, and buffalo, elk, deer, antelope, and other game abounded, and the chase was the only means of securing a living, and self-protection was the only means of safety. But how different are the conditions at the present time. The white man has come, civilization has come, the wilderness has been reclaimed and you are now surrounded on all sides by farms and fields. Horses, cattle, sheep, hogs, and other domestic animals have taken the place of wild animals. Law and order reign and you live in the midst of peace, security, and plenty. This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement. *Id.* at 81, JA at 308-309.[14]

(5) Important Omissions Regarding Reservation Statute and Article XVIII. The transcripts also document the fact that Article XVIII did not play a significant role with reference to 1858 reservation status at any time or at any place in the negotiation process. The district court confirmed this important omission:

> The transcribed minutes . . . . *do not divulge any discussion* that might have taken place as to the meaning the parties to the Agreement gave to Article XVIII, and there is *no discussion* as to whether the Yankton Sioux or the negotiators believed the 1858 boundaries of the reservation would change.

Yankton Sioux Tribe, 890 F.Supp. at 886 (emphasis added).

(b) Commissioners Report. On March 31, 1893, the Commission submitted their report to the Secretary of the Interior. S. Ex. Doc. No. 27 at 7, JA at 121-123. In approximately 18 pages, this report summarizes all significant aspects of the Yankton negotiations. In every respect it confirms the substance of points noted above. The transaction was aptly described by the Commissioners as a "cession of their surplus lands," or "purchase of the surplus lands" or "sale of their surplus lands," excerpts of the negotiations were restated in detail. *Id.* at 7, 17, JA at 107, 135, 146.

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[14] In more specific terms, the General Allotment Act (Section 5), formed the backdrop for this process as it did in the Lake Traverse negotiations discussed in *DeCoteau*. *DeCoteau*, 420 U.S. 425. It is also mentioned several times in the negotiations. Exh. 605 at 51, 52, 57, JA at 213-219, 232-235.

One paragraph in particular summarizes the entire process:

> First, That the Indians were *not selling their whole reservation, but less than two-fifths of it*, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty-five years, second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

S. Ex. Doc. No. 27 at 13, JA at 136, 137 (emphasis added).

The Commissioners concluded that the "purchase covers all the unallotted lands at a liberal price." *Id.* at 20, JA at 152. At the same time the Commissioners noted:

> Advancing civilization and the improvement of the surrounding country have immensely increased the market value of the land in this reservation, but aside from this increased valuation from external causes the reservation is worth much less to day than it was when they made the treaty with the United States 35 years ago. While the farm improvements on the reservation are very meager, large bodies of timber have been almost wholly destroyed, leaving the reservation nearly denuded of tree life without any compensating improvement . . . . At present these Indians are receiving no benefit worthy of mention from any of their lands. Not only are their surplus lands lying waste and useless, but the same is true of their allotted lands, as but an exceedingly small portion of these lands is under cultivation. *Id.* at 15, 19, JA at 142-143.

The report concluded:

> But for the opposition of these white employ[e]es we think that after we had drawn an agreeemnt in every way so favorable to the Indians we could more easily have overcome the objection on account of price,

> and that no other form of opposition would have been interposed, and that we could have secured the assent of nearly all the tribe to the sale. Few, if any, of the Indians were opposed to the sale of the surplus lands. *Id.* at 23, JA at 159.

(c) Congressional Ratification. When the report reached Washington, D.C., a bill to ratify the agreement was introduced in the Senate (S.442) but was delayed due to allegations involving the negotiations. *Id.* at 7, JA at 121-123. In September, 1893, the Commissioner of Indian Affairs detailed a special United States Indian Inspector to the reservation who, after an investigation, concluded "no undue pressure was used or improper methods resorted to by the commissioners or any other persons last winter to secure signers." *Id.* at 38, JA at 110.

Less than a month after the investigative report dated November 13, 1893, was received by the Commissioner of Indian Affairs, he formally submitted a favorable report on the entire agreement to the Secretary of the Interior. *Id.* at 1, JA at 108-109. This report again confirms the substance of all points noted above. In addition, it reviews the agreement *article by article*. Not a word in the entire six-page report supports the Tribe's contentions. Nor is there any doubt that the Yankton agreement was viewed as anything other than a normal cession. The Commissioner of Indian Affairs concluded his report in precisely this fashion:

> I have accordingly prepared the draft of a bill for that purpose, in the *usual* form and herewith transmit the same in duplicate. . . . Although it is probably not the duty of this office to draft a provision for the opening of the lands for settlement, I have for convenience incorporated a section for that purpose, in line with *similar* acts. *Id.* at 7, JA at 121-122 (emphasis added).

By letter of January 16, 1894, the Secretary of the Interior submitted the Commissioner of Indian Affairs report and enclosed a draft to the President of the United States Senate. *Id.* at 1, JA at 108-109. In this correspond-

ence, the Secretary specially noted that the correspondence contained "a full statement of the facts in relation to said agreement." *Id.*

Two days later, the entire package was referred to the Senate Committee on Indian Affairs in order to be printed as Sen. Exec. Doc. No. 27. JA at 108. This 101-page document contains the entire council proceedings with the Yankton Indians (47-101), the Articles of Agreement between the United States and the Yankton Sioux tribe (38-47), the investigative report (35-38), the Commissioner of Indian Affairs' draft of the bill to ratify and confirm the agreement and the Commissioner of the General Land Office correspondence relating to same (25-35), the report of the Yankton Indian Commission (7-25), the Commissioner of Indian Affairs report (1-7), and the Secretary of the Interior's submitted correspondence (1).

The Acting Commissioner of Indian Affairs noted the Yankton transmittal was somewhat special in one respect. For convenience, his office drafted and incorporated the "provision for the opening." S. Ex. Doc. No. 27 at 7, JA at 122. Normally, this was not, as the Commissioner pointed out, the "duty" of his office. *Id.* Because this provision contains the section sixteen (16) and thirty-six (36) "school lands grant," the source of this section is particularly significant. Moreover, the Acting Commissioner specifically stated that the provision was "in line with *similar* acts." *Id.* (emphasis added). The Acting Commissioner also suggested that the Commissioner of the General Land Office be requested to submit his views on this section. As a result, the Acting Commissioner of Indian Affairs, the Commissioner of the General Land Office, and the Secretary of the Interior, all had reason to focus on this significant "school lands grant" provision. *Id.*

The text of the "school lands grant" provision was reproduced twice in S. Ex. Doc. No. 27. S. Ex. Doc. No. 27 at 25, 35, JA at 162-165, 178-181. And although it was not singled out for special discussion, it did appear

throughout the congressional debates. 26 Cong. Rec. 6373, 6425, 7628. With the Great Sioux Act of 1889 and the Sisseton-Wahpeton (Lake Traverse) Act of 1891 as recent precedent (as the State has pointed out), the limited congressional discussion of this "public domain" related provision in the debate is understandable. State's Br. at 19-20. *See also Rosebud*, 430 U.S. at 599-601.

In the interim, as in *DeCoteau*, newspapers reported that many settlers anxiously awaited the opening of the reservation:

> The prospect for the early opening of the Yankton reservation is causing quite a stir at Armour. Inquiries are pouring in from all directions, and the minute the bill passes congress there will be a rush to be on the ground.

Yankton Press and Dakotan, Feb. 15, 1894.

> It is expected that when the president declares the reserve open there will be a great rush for land.

Yankton Press and Dakotan, Feb. 17, 1894.

Similarities to the opening of the Sisseton-Wahpeton (Lake Traverse) reservation do not end here. As noted *supra* at p.10, in Congress, the Yankton agreement was eventually presented for ratification as part of the annual Indian department appropriation bill, the same process utilized for ratification in *DeCoteau*. *DeCoteau*, 420 U.S. 425, 440. Moreover, here, as in *DeCoteau*, other agreements were also a part of this package. *Id.* at 439 nn.21, 22. If Congress did not intend this cession agreement for a sum certain to disestablish the Yankton reservation, there is certainly no evidence of such intent in any of the documentation.

On March 2, 1894, a significant number of "chiefs, headmen and members of the Yankton tribe of Sioux Indians" met at the Yankton Agency, Greenwood, South Dakota, and prepared a petition to the Chairman to the Senate Committee on Indian Affairs. The purpose of the petition was to request the Senator to use his "influence in the passage of the bill effecting our treaty with the

U.S. Government for the relinquishment of our surplus land." Sen. Misc. Doc. 134 at 2, 53d Cong., 2d Sess. (1894).

In support of their position, the petitioners stated:

> When we signed the treaty we knew what we were doing for ourselves and for the Yankton tribe in general. We did sign it because we love and respect our families, for whom we expect a support could be made out of the sale of our surplus lands. . . . We think it is a good treaty. We have had a good understanding of its provisions and the compensation. . . . We want the nation to take on new life by becoming good farmers and mechanics and professional men, and that they should all be good citizens of the United States. We do not want to become loafers and beggars like the majority of the opposition. We want the laws of the United States and the State that we live in to be recognized and observed. We do not think it is a proper thing to keep up the tribal relation—like the tribal relation and its existence now on this reservation—as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization. For instance, the matter of the tribal relation is a bondage to a tribe of Indians where the tyrannical chiefs are principally looked upon for advice, but of course there are some exceptions. . . . We are therefore anxious that this treaty should go through at once, so as to enable us to receive a sufficient sum of money as cash payment to improve us mentally and physically. Without this treaty we have no hope of prosperity, and no desire for civilization. We think it will benefit our children by associating them with white people, especially in the schools and in farming.

Sen. Misc. Doc. No. 134 at 1, 2.

On April 3, 1894, South Dakota Senator Pettigrew ordered the petition to be printed and presented to the Senate in its entirety. Sen. Misc. Doc. No. 134 at 1.

The bill, H.R. 6913, was introduced and reported to the Committee of the Whole House by the House Committee on Indian Affairs on April 30, 1894. 26 Cong. Rec. 4275, 53d Cong., 2d Sess. (1894); H.R. Rep. No. 802, 53d Cong., 2d Sess., pt. 5 (1894). The appropriation report especially noted:

> There are a few legislative provisions in the bill, most of which have been recommended by the Commissioner of Indian Affairs, although in some instances modified by the committee. *The most important* of these legislative provisions are the ratification of *agreements* made with the Yankton Sioux . . . for the *cession* of land. . . .

H.R. Rep. No. 802 at 2, 53d Cong., 2d Sess. (1894) (emphasis added).

In the many pages of general congressional debate that follow, nothing of substance can be cited to support the argument that Congress intended to leave the original boundaries of the reservation intact. In fact, every exchange points to the opposite conclusion.[15]

For example, by June, 1893, the House started to focus on reservation policy generally:

> Mr. WILSON of Washington. I will ask the gentleman whether he does not think a start should be made by diminishing the reservations. There are now about 120,000 reservation Indians, and they occupy about 5,000,000 acres of land. 26 Cong. Rec. 6235 (1894) (Exh. 669).
>
> Mr. SMITH of Arizona. Yes, they hold five times as much land as they ought to occupy. They are roaming over great areas of land now, and that tends to keep them in a wild state, because it keeps

[15] Of course, this is not to say that the record does not also contain an occasional reference to "in" or "on" the reservation. But as the Tenth Circuit Court of Appeals aptly pointed out in *Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1416 (10th Cir. 1990), such references are of little probative value. Similar references also appear throughout the documentation in *DeCoteau* and *Rosebud*. See also the reference in *Hagen* to a similar "longstanding observation" regarding the views of a subsequent Congress. *Hagen*, 510 U.S. at 420.

them removed from all sorts of civilizing and educating influences. As long as the Indian is allowed to occupy reservations, some of which are as large as an Eastern State. . . . 26 Cong. Rec. at 6235.

Mr. FLYNN. I realize the fact that we are constantly crowding the Indian more and more off his reservations because we want more land for white settlement. *Id.* at 6236.

Mr. HARTMAN. Mr. Chairman, let us proceed by treaty to extinguish every right, if they have any, in the lands of the Indian reservations; let us purchase the lands and allot to them 160 acres each. . . . *Id.*

Mr. COFFEEN. There is much more land given to the Indians in reservations than is proper. They have too much. I join in the sentiment that we must, by treaty, by purchase, and relinquishment, or by some other methods, cut down this vast territory in reservations that often blocks the settlement of great tracts of Western country. That is one of the things that must be done. *Id.*

Mr. BLAIR. Here are 250,000 people . . . occupying an amount of territory which would yield support to at least ten millions of civilized people. *Id.* at 6237.

Mr. WILSON. Of course, if we are never to commence with a reduction of the reservations and of the appropriations, the Indian problem will not be settled. . . . There are places, Mr. Chairman, and there are Indian reservations, that if Congress would do its duty could be closed up and disposed of forever. *Id.*

In those instances when the Yankton measure was first singled out because of the lower settler acreage provisions and the higher interest rate, general references to "cession," "General Allotment Act," and other "common practices" support this same view. *Id.* at 6373, 6374.

And on June 16, 1894, when the debate centered on the Yankton agreement, reference to "public domain" and other similar comments are even more probative:

MR. McRAE. Certainly not until the treaty is confirmed; but these provisions change the methods of disposing of the lands that will become a part of the *public domain* under these agreements. . . .

MR. LYNCH. The Government obtains these lands at different prices in different cases. By some of the treaties the lands cost 75 cents or 80 cents or $1 an acre; and in one case, that of the Yankton Reservation, the Government pays $3.50 an acre. . . .

MR. LYNCH. These different methods of disposing of these surplus lands are absolutely necessary. In regard to the Yankton Reservation the committee were of the opinion that as the price of those lands was $3.75 an acre, $1.60 an acre would come too high for a poor man to buy, and therefore we concluded to reduce the amount which one man could enter there to 80 acres. Each reservation was taken up on its own merits, and disposed of on its own merits. *Id.* at 6425, JA at 380, 381, 382 (emphasis added).

In that same debate, others described the process with references to the same concepts and laws:

Mr. HERMANN. They do not become lands of the United States at all until after the ratification of the treaty made with the Indians. Then and only then do they become subject to our land laws. . . . In order to convince the Chair of that fact I ask his kind attention to the act approved February 8, 1887, the law providing for the allotment of lands in severalty among the Indian tribes, in which will be found this provision. . . . [T]hey are not public lands of the United States; they are not governed by any of the public land laws until they become segregated from the Indian lands and become in fact a part of our public domain. *Id.* at 6426, JA at 385, 386.

In other specific instances, remarks similar to those noted above, were again repeated:

We have endeavored for years and years to get the Shoshone Reservation, which contains three times as much land as is necessary, or in any manner used by the Indians, relinquished to the United States, so that people could settle on it and make homes and

go on and develop that part of the State. 26 Cong. Rec. 6431, 53d Cong., 2d Sess. (1894).

After the Chair found that a general point of order was not well taken, the bill passed the House that same day. *Id.* at 6427, 6431. Although the message that the bill had passed the House was immediately recorded in the Senate, it was not reported from the Senate Committee on Appropriations until July 10, 1894. *Id.* at 6439, 7230; S. Rep. No. 510, 53d Cong., 2d Sess. (1894).

The Senate debate started on July 18, 1894, and later that same day, the Senate specifically addressed the Yankton agreement. 26 Cong. Rec. 7616, 7627. As was the case in the House, nothing of substance in the Senate debates supports the argument of the Tribe that Congress did not intend this cession agreement to disestablish the original boundaries of the Yankton reservation. Minor unrelated changes were accepted or rejected on the basis of "business as usual." For example, see the "rule which has been pursued in all other Indian appropriations acts" comment and the "I doubt whether we ought to make a different provision in the opening of one of these reservations" comment. *Id.* at 7628. At the same time, the liquor prohibition provision was amended in final form without debate. *Id. See Rosebud,* 430 U.S. 584, 613-617 n.47, and citing *Dick v. U.S.*, 208 U.S. 340 (1908). *See also* State's Br. at 17-19, 33-34.

The next day, other provisions of the bill were discussed and approved including legislation initiating negotiations for the Uintah and Uncompahgre reservations in Utah that similarly support disestablishment arguments.[16] Other

[16] Both Utah measures were subsequently modified in later legislation. This Court in *Hagen* rejected an original boundary argument and held that the Uintah reservation was diminished. *Id.* The panel majority completely missed the point, citing the 1985 Tenth Circuit case with reasoning since disavowed as "unexamined and unsupported" by the Tenth Circuit and effectively undermined by this Court, which expressly noted this very point. *Yazzie*, 909 F.2d at 1400; *Hagen*, 510 U.S. 414. Pet. App. at 28 n.21. In later litigation, the United States conceded the Uncompahgre reservation no longer exists. The Tenth Circuit has since decided, however, that the principles of finality outweigh congressional intent. *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997). Reportedly, a petition for certiorari will be filed from that decision in the near future because of an overly narrow reading of *Hagen* and the inequitable result that the finality holding promises. *See* Brief of Duchesne County, Utah and Uintah County, Utah, as *Amici Curiae*.

reports were submitted for the record that also continue to reflect the familiar forces noted throughout the Yankton documents. Under a subheading of "Indian Lands and Their Purchase," a report by Mr. Donaldson noted:

> After the reservations were established by executive order or by law they *were and are still being diminished,* by an actual *decrease of reservation lines*, either by the demands of settlers, forcing reduction, or by the modern method of allotment, the Indians, by the latter method, being paid for the excess of the reservation they occupy. When reservations are *diminished* in gross the Indians are paid for the area of the reservation which the Government takes possession of and disposes of under the various laws.

26 Cong. Rec. 7689 (emphasis added).

After additional unrelated debate, the bill, as amended, passed the Senate the same day. *Id.* at 7708.

The House did not concur in the Senate amendments and requested a conference on July 21, 1894. *Id.* at 7783-7784. On July 23, 1894, the Senate insisted on its amendments and agreed to a conference. *Id.* at 7800. After the conference, the Senate still disagreed with some amendments and reported the same with a request for a further conference. *Id.* at 8015. The House noted the partial concurrence and printed the report of the committee of conference in the record. *Id.* at 8056.

On August 2, 1894, the House consented to a further conference, specifically noting that the subjects upon which no conclusion had been reached included:

> [T]he appropriation of money for lands purchased from the Nez Perce Indians of Idaho and lands pur-

chased from the Yankton Sioux in South Dakota, and lands purchased from the Siletz Indians of Oregon. *Id.* at 8136.

On August 6, the House again considered the matter. *Id.* at 8251. This debate, which extends throughout some 20 pages of the congressional record, contains additional references that support the conclusions noted above. The controversy continued to center around the amount and how the money should be paid, as well as the interest involved, but the comments leave no doubt as to the general view of Congress. *Id.* at 8255. Miscellaneous tributes were initially paid to Mr. Dawes (*Id.* at 8252), and references to "always been the practice" and "nearly universal customs" continued (*Id.* at 8255). Other comments describe the familiar forces:

> Mr. WILSON of Washington. All over the West . . . constantly letters to know when this reservation will be open to settlement. It is exceedingly valuable and fertile land, and will give an opportunity to build up a great agricultural community there. . . . This country is greatly interested in the result. We are gradually closing up our reservations; we are gradually getting them settled by the white people. *Id.* at 8256, 8257.

Later in the same debate the Yankton agreement was again specifically referenced. *Id.* at 8265. Representative Pickler of South Dakota made clear that it and the others represented "the same kind of a treaty we have always made." *Id.* He also noted again:

> [I]f that has not been the *universal practice* of the Government, and if we have not bought Indian lands during a period of time immemorial? Have we not also sold the lands to settlers? Is there anything *new* in that? . . . [T]he treaty for the Yankton Sioux Reservation; and *what can be said of that treaty can, in general terms, be said of the others.* The proposition that is before the House today is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to *treat with the Yankton Sioux Indians for their reservation.* . . . [W]e simply procure these lands in the same way we have always procured lands from the Indians. We make *no departure from our past policy*; we are following in the *same* line. . . . [W]hat is the *uniform* policy of the Government in these matters. The Government does not want to speculate off of settlers; so it buys lands from the Indians as fairly and as cheaply as it can, and then disposes of the lands to the settlers at such prices as will reimburse it for the money paid to the Indians.

> That is the policy pursued in all these cases. And until very recently the Government purchased the lands of the Indians and disposed of them to the settlers free, but lately it is charging the settler what it paid the Indians. . . . [A]nd these are treaties, just as *all other cessions* of land have been. . . . Let us settle with the Indians at once and give the settlers all over this country who want homes an opportunity to secure them. . . . Does not the gentleman know that heretofore we have bought the lands of the Indians and given the lands to settlers? Now we are buying land from the Indians and selling it to the settlers. . . . *Id.* at 8266, 8267-8269 (emphasis added).

> MR. LYNCH . . . My short experience on the Committee on Indian Affairs has taught me that in every instance the Government has lost in its deal by buying these lands of the Indians.
>
> MR. WILSON of Washington. Will the gentlemen be kind enough to state a sing[l]e case?
>
> MR. LYNCH. Why, in all of them. The highest price we ever paid was a dollar until the treaty with the Yankton Sioux Reservation came up; and even on that we shall lose. *Id.* at 8266.
>
> MR. WILSON. . . . And this [another] reservation is standing as a block in the way of the development and progress of the country. That is one reason why it is so important that action, and prompt action, should be taken upon this treaty. . . . I hope in return that they may be as generous to the people of the West, and help us to develop that empire, and throw open the reservations of the Government. *Id.* at 8271.

At the end of the next day, on August 7, 1894, the House considered the question and without substantial debate, receded from the disagreement to the Senate amendments, and agreed to the same. *Id.* at 8287. The Senate submitted a brief report on August 8, 1894, noting agreements and disagreements and this conference report was "concurred in." *Id.* at 8296. The bill was signed in the House on August 9, 1894, the Senate on August 10, 1894, and by the President on August 16, 1894. *Id.* at 8360, 8362, 8592. Act of Aug. 15, 1894, 28 Stat. 286.

One final point in the congressional ratification process is worthy of special notation. Here, as in the tribal negotiations, there were no references to Article XVIII and reservation status. The district court also confirmed this important omission. Other than one letter from a missionary, there was:

> [N]o other mention of Article XVIII in the legislative history of the ratification Act.

Yankton Sioux Tribe, 890 F.Supp. at 886; Pet. App. at 82-83.

The dissent in the court of appeals agreed with this finding:

> [N]owhere in Article XVIII nor in the legislative history of the 1894 Act is there any suggestion that the 1858 boundaries were to remain intact. . . .

Yankton Sioux Tribe, 99 F.3d at 1462 (emphasis added).

As a result, another presumption should be considered here. Although *Matter of Heff*, 197 U.S. 488, 499 (1905) was subsequently modified by Congress and overruled in *United States v. Nice*, 241 U.S. 591 (1916), the common sense presumption noted in *Heff* regarding congressional action and constancy in federal Indian law policy is as viable now as it was then: namely, that in matters of federal Indian law involving congressional action, courts will "presume" that "no radical departure is intended." *Heff*, 197 U.S. at 499. That presumption is important in this case in light of the significant omission in this record of Article XVIII reservation status discussions. In other words, if Article XVIII was intended by Congress to preserve reservation status in the face of a sum certain cession agreement, that would certainly constitute a "radical departure" in congressional federal Indian law policy. In South Dakota and elsewhere, previous cessions like this disestablished reservations. The Yankton documentation *confirms* that this process was simply business as usual. If Article XVIII was intended to change all of this, someone, somewhere, should have at least mentioned the point. The District would submit that nothing in the formal instructions, nothing in the tribal negotiations, nothing in the departmental recommendations and bill drafts, nothing in the House and Senate reports, nothing in the congressional debate and nothing in the 1894 Act itself can be cited to substantiate this Article XVIII reservation status argument. Congress did not intend to preserve the 1858 boundaries of the Yankton Sioux reservation.

The Presidential Proclamations opening the reservations to settlement were deemed especially significant in *Rosebud*, 320 U.S. at 602-603, and *Hagen*, 510 U.S. at 419-420. And the United States in *DeCoteau*, arguing in support of original boundaries, agreed that the Proclamation was "the most important administrative interpretation . . ." Brief of the United States at 22, *DeCoteau*, No. 73-1148. In this instance, the cession terminology of the Yankton Proclamation similarly reflects this same important construction:

> Whereas . . . the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, *ceded, sold, relinquished, and conveyed* to the United States, *all their claim, right, title and interest in and to all the unallotted lands* within the limits of the reservation set apart to said tribe. . . . Whereas . . . *lands so ceded and sold* shall, immediately after the ratification of the agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws

> of the United States, to actual and bona fide settlers only. . . . Whereas . . . *by said agreement ceded*, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States. . . . Now, therefore, I Grover Cleveland, President of the United States, by virtue of the power in me vested by the Statutes hereinbefore mentioned, do hereby declare and make known that *all of the lands acquired from the Yankton tribe of Sioux or Dacotah Indians by the said agreement*, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same, will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty first day of May, 1895 and not before, *be open to settlement*. . . .

Yankton Proclamation of May 16, 1895, 29 Stat. 865 (emphasis added).

II. JURISDICTIONAL HISTORY.

A. Settlement.

As the district court acknowledged and found, the settlement process in this area was successfully accomplished:

> Non-Indians rapidly settled and purchased the lands ceded by the Yankton Sioux. . . . White settlers *rapidly* entered and settled the opened areas of the reservation. . . . [E]vidence tends to show that the opened lands *quickly* lost their Indian character.

Yankton Sioux Tribe, 890 F.Supp. at 884, 887 (emphasis added). The court of claims documented a similar conclusion in 1980 in the following fashion:

> Settlement proceeded at a *rapid* pace. In the 75½ months [sic] remaining of the year 1895, over 56,000 acres were taken up by settlors. In 1896, over 13,000 additional acres were taken up, and in 1897, over 35,000 acres were taken up. Thus, over 100,000 acres were taken up in the first 3 years. During the first 5 years, almost 90 percent of the lands were taken up. Thus, it is clear from the record that there was an *extensive demand* for the type of agricultural lands present. . . .

Yankton Sioux Tribe, 623 F.2d 159, 171 (8th Cir. 1980) (emphasis added).

The panel majority mentioned none of this and, at the same time, set forth comments at odds with these express findings. *Yankton Sioux Tribe*, 99 F.3d at 1456-1457.

In implementing the Proclamation, the rest of the federal government simply treated the area in a manner that routinely conformed to the executive mandate. The standard requirement that the land be disposed of under the "existing laws of the United States" was readily accomplished in the proper land offices. In this instance, even the less desirable tracts, such as the one chosen by Southern Missouri as a future site, were filed upon at a relatively early date.

In less than 10 years after the opening, Mr. Lars K. Langeland completed all requirements and received a Certificate of the Register of the Land Office at Mitchell, South Dakota. United States Patent, March 1, 1904, Dist. App. at 1a. The Certificate established that his claim had been duly consummated pursuant to "the Act of Congress approved 20th May, 1862, 'To Secure Homesteads to Actual Settlers on the Public Domain,' and the acts supplemental thereto. . . ." *Id.* at 1, Dist. App. at 1a. On March 1, 1904, President Theodore Roosevelt confirmed that the Certificate had been deposited in the General Land Office of the United States and therefore:

> [G]ranted by the United States, unto the said Lars K. Langeland the tract of land above described, TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereof, unto the said Lars K. Langeland and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of Courts, and also subject to the right

> of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

Id. at 1, 1904, Dist. App. 1a-2a.

Nothing in this documentation supports the conclusion of the panel majority. In fact, the entire Patent was in a standard printed format with the usual blank spaces for names, dates, descriptions and signatures. For the convenience of the Court, a copy of the Patent is reproduced as Dist. App. at 1a.

In general, the federal government's use of this standard format would not seem to support a claim that this property or this area was intended by Congress to be specially located or restricted because of some isolated clause in the 1894 Yankton Act. In more specific terms, the express reference to "the Act of Congress approved May 20, 1862, 'to secure homesteads to actual settlers *on the public domain*' " would seem to support the opposite conclusion. *Id.* at 1, Dist. App. at 1a. Now that *Hagen* has clarified the significance of the "public domain" concept, this aspect of the Patent and settlement process should be deserving of more detailed consideration.

B. The Position of the Department of the Interior.

The jurisdictional history also confirms that the area in question was not treated as an Indian reservation. The district court found that from the beginning "state courts exercised civil and criminal jurisdiction in the opened area of the reservation." DCO Pet. App. at 87. On this point, the panel majority conceded that the tribe had presented:

> [N]o evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands.

Pet. App. at 39.

In addition, the panel majority also agreed with the district that:

> State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently.

Pet. App. at 38.

The Supreme Court of South Dakota reiterated:

> Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries.

Pet. App. at 154-155.

The brief for the State of South Dakota details the significant citations and circumstances surrounding the exercise of this jurisdiction. State's Br. at 7-9, 41-46. That effort, of course, will not be repeated here. The treatment of a related argument in the opinion of the panel majority involving the position of the Department of the Interior, however, is deserving of more extended consideration.

In spite of the unequivocal concessions regarding the jurisdictional history, the panel majority pieces together and highlights conflicting points as if they were somehow more probative of congressional intent. The foremost example concerns the position of the Department of the Interior regarding reservation status. In an attempt to undermine the strength of a formal 1969 Memorandum to the Commissioner of Indian Affairs that specifically confirmed that "the effect of the 1894 Act was to eliminate reservation boundaries. . . .," which is in the record (JA at 519), the majority opinion discusses an earlier 2½ page informal letter by Felix Cohen, as acting Solicitor, that primarily addressed a different act, which is not in the record. *Yankton Sioux Tribe*, 99 F.3d at 1455; Pet. App. at 36-37; Letter of August 7, 1941, *Opinions of the Solicitor, Department of the Interior* 1063 (1979). This 1941 letter was not assigned a memorandum number, an Interior Decision (I.D.) or Public Lands Decision (L.D.) citation, and there is no indication that it was ever otherwise approved by the Department of the Interior at the time.

In addition, the United States and other *amici* in support of the Yankton Sioux Tribe also relied heavily on this letter—which now erodes their position for one very significant reason. Brief for Vine Deloria, Jr., *et al.* as *Amici Curiae* in Support of Appellee at 16, *Yankton Sioux Tribe*, 99 F.3d 1439 (No. 96-1581). At oral argument, the United States stressed that "especially great weight" should be given the opinion. See excerpts, Dist. App. *infra* at 6a. In the 1942 original edition of Felix S. Cohen's Handbook of Federal Indian Law, published subsequent to the August, 1941 letter, the text completely and expressly *undermines* every basis for the 1941 position. F. Cohen, Handbook of Federal Indian Law at 353 (1942 ed.). Significantly, the Handbook analysis leads off with a citation to *Perrin v. United States*, 232 U.S. 478 (1914) (conceded by the United States to have "assumed" Yankton reservation disestablishment) as authority for liquor "buffer" areas which "adjoined Indian country," non-reservation areas next to the "boundaries of land retained by the Indians." *Id.* at 353 n.26. The text also cites the other two non-reservation liquor prohibition cases, *United States v. Forty-three Gallons of Whiskey*, 108 U.S. 491 (1883) and *Dick v. United States*, 208 U.S. 340 (1908).

The 1958 edition of Federal Indian Law repeats verbatim the original text, and footnotes, including the lead citation to *Perrin*. U.S. Dep't of Interior, Federal Indian Law at 385 (1958 ed.). And even the 1982 edition of Felix S. Cohen's Handbook of Federal Indian Law, although it alters the text and the terminology and deletes the citations to both *Perrin* and *Dick, preserves the concept* of liquor restrictions in "buffer" areas, appropriately described as "areas *formerly* Indian country." F. Cohen, Handbook of Federal Indian Law at 307 (1982 ed.). Moreover, this 1982 text still cites *United States v. Forty-three Gallons of Whiskey* as initial authority for these "off" reservation "formerly Indian country" areas, and significantly adds an express reference to *Rosebud*, 430 U.S. 584, 611 (1977). As cited, *Rosebud*, 430 U.S. at 611 (and at 613-615) details the significance of a similar

liquor prohibition provision in the 1910 *Rosebud* act, that *Rosebud* held disestablished a portion of the Rosebud reservation. *Id.* at 307 n.206. The District appends complete excerpts from all three texts for the convenience of the Court. Dist. App. at 3a-5a.

Although these texts completely undermine the 1941 letter in every significant respect, other aspects of the argument lend even more credence to reservation disestablishment. For that reason, the letter still merits the more detailed discussion that follows.

The letter was actually directed to the interpretation of a 1934 Act removing the operation of the Indian liquor laws from former Indian lands. Act of June 27, 1934, 48 Stat. 1245 (sponsored by Representative Werner of South Dakota). The question involved the City of Wagner, South Dakota, which is within the 1858 Yankton reservation. The letter correctly concluded that the 1934 liquor law applied only to "lands outside the exterior boundaries of Indian reservations." However, it erroneously disagreed with the "administrative conclusion" of the Commissioner of Indian Affairs, that the "town and other ceded lands are outside an existing Indian reservation."

The substantive basis for this "matter of law" conflict over reservation status with the Commissioner of Indian Affairs was resolved in *DeCoteau*, where the overly simplistic distinction noted in the 1941 letter was authoritatively rejected. The 1941 letter maintained that:

> The act should be distinguished from other cession acts which ceded a definite part of the reservation and treated the remaining area as a diminished reservation.

Op. Solic. Dep't Interior at 1064.

DeCoteau made clear that this "whole vs. definite part" cession distinction was meaningless in terms of the scope and effect of congressional intent:

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather

than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151(c). See *United States v. Pelican*, 232 U.S. 442. With the benefit of hindsight, it may be argued that the tribe and the Government would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments. But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

DeCoteau, 420 U.S. at 446-447 (emphasis in original).[17]

[17] Petitioner in *DeCoteau* relied on a warmed over version of this exact argument. Brief for Petitioner at 15-16, *DeCoteau*, No. 73-1148, excerpted in Dist. App. *infra* at 13a. The United States, as *Amicus Curiae*, in Support of the Tribe, submitted this same "whole vs. definite part" cession distinction ("no specific area ceded") argument in *DeCoteau* and in *Feather v. Erickson*, which was argued in tandem with *DeCoteau*. Brief for the United States at 14, excerpted in Dist. App. *infra* at 7a; Transcript of Oral Argument at 12, *Erickson v. Feather*, No. 73-1500. It was not well received at oral argument, as the *DeCoteau* opinion subsequently confirmed. But see the "described tract" argument set forth by the dissent in *DeCoteau*, 420 U.S. at 463-464.

Generally speaking, it is doubtful if there will be any arguments submitted in this case that have not already been submitted and rejected in *DeCoteau*. For example, the Tribe and the United States in *DeCoteau* also stressed that Congress never referred to the area as a "former reservation." Brief for the Tribe at 32 n.23 ("No Congressional act contains such a reference"), Brief for the United States at 27 ("Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton Reservation or Agency and has never referred to the Reservation as a 'former reservation' " . . . .). *DeCoteau*, No. 73-1148. The panel majority deemed this omission significant. 99 F.3d at 1464. The Court did not deem that fact to be significant in *DeCoteau*. In addition, Congress did refer to the area here as the "former Yankton reservation," as South Dakota has pointed out. Brief for Petitioner at 44, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997).

Importantly, the letter also failed to mention that in 1934 John Collier, as Commissioner of Indian Affairs, had already concluded, in a comprehensive formal Instruction Opinion, that cessions such as the Yankton cession Act disestablished Indian reservations, as the Department of the Interior had since repeatedly recognized:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being a part of that reservation.

54 Interior Dec. 559, 560 (1934) (emphasis added).

And this Instruction Opinion was specifically approved by Fred W. Johnson, the Commissioner of the General Land Office and Harold L. Ickes, the Secretary of the Interior.

The United States should have told the court of appeals that the 1941 letter expressly conflicted with the fundamental premise in the Instruction Opinion of Commissioner Collier. As Charles Mix County has pointed out, in *Rosebud*, the United States reminded this Court of the 1934 Instruction Opinion, which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*. Memo. of the United States at 19-21, *Rosebud* (No. 75-562) and Brief for the United States, Co. Pet. App. at 79a "The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that 'The lands thereby separated from a reservation were no longer looked upon as being a part of that reservation' (54 I.D. at 560)." *Id.* As the United States also pointed out, the Collier list in the 1934 In-

struction Opinion included some 26 "reservations." It did not include *either* the Yankton or Sisseton-Wahpeton (Lake Traverse) cession. Brief of the United States, Rosebud (No. 75-562), Co. Pet. App. at 80a.

In addition, the letter simply glossed over the other 1934 itemized list of the Department of the Interior that included the 1894 Yankton Act, submitted by Secretary of the Interior Harold L. Ickes and expressly incorporated in the House and Senate reports that accompanied the 1934 liquor law legislation, which also failed to recognize this "whole vs. definite part" distinction. H.R. Rep. No. 1681, 73d Cong., 2d Sess. (1934) and S. Rep. No. 1423, 73d Cong., 2d Sess. (1934). According to the letter, the list was simply "informative" not "determinative." Op. Solic. Dep't Interior at 1065.

Moreover, the fact that the Interior list began with a Rosebud Act and a Pine Ridge Act, which Mr. Cohen conceded disestablished areas of Indian reservations, should have supported the opposite conclusion. (*See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *U.S. ex rel. Cook v. Parkinson,* 525 F.2d 120 (8th Cir. 1974), *cert. denied,* 430 U.S. 982 (1977)). Op. Solic. Dep't Interior at 1065. In this instance, however, it did not. (This 1941 letter was not briefed or discussed until after *Rosebud* was decided).

Instead, the 1941 letter cites two statutes enacted decades later. *Id.* at 1064. Because each statute referred to the Yankton reservation, the letter assumed that the 1858 reservation was a "still existing unit." *Id.* at 1064. As a result, according to the letter, these statutes represented a congressional confirmation of sorts that Congress never intended to disestablish the reservation in the first instance. *Id.* While this appears to be the earliest use of this type of "evidence" of congressional intent in cases of this nature, that is the only significant aspect of the argument. This Court, in *DeCoteau, Rosebud,* and *Hagen* repeatedly rejected the same type of argument because of the unreliable nature of this "evidence."

For example, the South Dakota Supreme Court in *Greger* pointed out that the *Rosebud* opinion expressly noted:

> The material presented by the parties reveals no consistent, or even dominant, approach to the territory in question. In light of the clear assumption of jurisdiction over the past 70 years by the State of South Dakota of the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory, *history of congressional and administrative actions* in other respects carries but little force.

Greger, 559 N.W.2d 845 at Pet. App. 154 (citing *Rosebud,* 430 U.S. at 605 n.27) (emphasis added).

Secondly, in this instance, one of the statutes was directed to land that was, at the time, still held in trust by the United States as part of the Yankton Presbyterian Church and school reserve. Act of April 29, 1920, 41 Stat. 1468. The other statute described the judicial district of South Dakota and the southern division was stated to include, without description, the territory embraced on January 1, 1932 in the "Yankton reservation," just as the northern division was said to include territory in the "Lake Traverse reservation" (*See DeCoteau,* 420 U.S. 425). Act of June 11, 1932, 47 Stat. 300. Both descriptions were simply carried over from the text of earlier statutes. H.R. Rep. No. 599, 72d Cong., 1st Sess. (1932). In this light, the statutes are probative of very little.

The 1969 opinion, which pre-dated *DeCoteau,* but clearly recognized the significance of cession terminology and cession jurisprudence, should have been more instructive to the panel majority. The 1969 opinion cited with approval one of the principal cession decisions involving an entire South Dakota reservation, *DeMarrias v. South Dakota,* 319 F.2d 845 (8th Cir. 1963) (involving the 1891 Lake Traverse act construed in *DeCoteau*). It also aptly described the 1894 Yankton cession act and the 1891 Lake Traverse cession act as "in pertinent respects *identical.*" JA at 522 (emphasis added). In addi-

tion, the specific conclusion in the 1969 opinion recognized that the Yankton Act of August 15, 1894 did "eliminate reservation boundaries." And finally, the *Demarrias* decision was, in all substantial respects, later affirmed by this Court in *DeCoteau*.

In other instances, even the United States has recognized that Acting Solicitor Cohen sometimes "ignored" "authoritative rulings" and "current instructions of the Department of the Interior." Supplemental Memorandum for the Petitioner at 5, *Squire v. Capoeman*, 351 U.S. 1 (1956) (No. 134). According to the United States, he also cited in support of his position materials of "no current vitality," agency opinions "explicitly overruled" and court of appeals' opinions "explicitly rejected" by this Court, as the United States has explained to this Court in the past. *Id.* at 5. In that case, the United States correctly concluded that such views should be:

> [R]ejected as inaccurate and entitled to no weight as evidence of contemporaneous administrative practice.

Id. (footnote omitted).

In this case, the 1941 letter is also deserving of this limited consideration. *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-153 n.9 (1973) (views rejected). The 1941 letter, which fails to cite earlier Interior decisions and the 1934 Instruction Opinion, which was subsequently ignored and the premise of which was expressly rejected in *DeCoteau v. District County Court*, should not be significant here.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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August 7, 1997

APPENDIX

APPENDIX TABLE OF CONTENTS

UNITED STATES PATENT

THE UNITED STATES OF AMERICA

To all to Whom these Presents shall Come, Greeting:
HOMESTEAD CERTIFICATE No. 12,889
APPLICATION 30,541

WHEREAS, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Mitchell, South Dakota, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Lars K. Langeland has been established and duly consummated in conformity to law, for the South half of the North West quarter and the North half of the South West quarter of Section six in Township ninety six North, of Range sixty five West of the fifth Principal Meridian in South Dakota, containing one hundred and sixty acres according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

NOW, KNOW YE, That there is, therefore, granted by the United States, unto the said Lars K. Langeland the tract of land above described, TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereto, unto the said Lars K. Langeland, and to his heirs and assigns as may be forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of Courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore

therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the first day of March, in the year of our Lord one thousand nine hundred and four and of the Independence [SEAL] of the United States the one hundred and twenty-eight.

By the President: T. Roosevelt

By T. M. McKean
Secretary.
C. H. Brush
Recorder of the
General Land Office.

Recorded South Dakota, Vol. 253 Page 399.

Filed for Record the 25th day of August A.D. 1904, at 11 o'clock A.M. and recorded in Book F of Patents on page 195.

Register of Deeds.
C. Aaron Jones

CERTIFIED COPY

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT REPRODUCTION OF INFORMATION APPEARING ON A RECORD FILED IN THE REGISTER OF DEEDS OFFICE CHARLES MIX COUNTY, LAKE ANDES, SOUTH DAKOTA

DATE ISSUED 7-3-97

/s/
Register of Deeds

Excerpt From F. Cohen, Handbook of Federal Indian Law 353 (1942 ed.)

* * * *

In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions.[23] Pursuant to this power and the power over the territory and other property belonging to the United States,[24] the Federal Government has imposed liquor restrictions on lands ceded to it by the Indians when these lands adjoined Indian country.[25] The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the Indian liquor laws to "buffer" areas the states would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the United States Supreme Court.[26] The power lasts only so long as Indians are present on the retained reservation lands and remain wards of the Government.[27] In 1934, Congress withdrew liquor restrictions from the "buffer" lands.[28]

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[23] U. S. Const., Art. I, sec. 8, cl. 18.

[24] U. S. Const., Art. IV, sec. 3, cl. 2.

[25] Act of December 19, 1854, 10 Stat. 598 (Chippewa); Act of March 1, 1893, 28 Stat. 693 (Indian Territory); Act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of June 16, 1906, 34 Stat. 267 (Oklahoma, Indian Territory, New Mexico, and Arizona); Act of May 6, 1910, 36 Stat. 348 (Yakima); Act of June 20, 1910, 36 Stat. 557 (New Mexico and Arizona); Act of May 11, 1912, 37 Stat. 111 (Omaha); Act of July 22, 1912, 37 Stat. 197 (Colville); Act of February 14, 1913. 37 Stat. 675 (Standing Rock); Act of May 31, 1918, 40 Stat. 592 (Fort Hall); Act of June 4, 1920, 41 Stat. 751 (Crow).

[26] *Perrin* v. *United States*, 282 U. S. 478 (1914); *Dick* v. *United States*, 208 U. S. 340 (1908); *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491 (1883).

[27] *Perrin* v. *United States, supra.*

[28] Act of June 27, 1934, 48 Stat. 1245, 25 U. S. C. 254.

Excerpt From U.S. Dept. of Interior, Federal Indian Law 385 (1958 ed.)

In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions.[14] Pursuant to this power and the power over the territory and other property belonging to the United States,[15] the Federal Government has imposed liquor restrictions on lands ceded to it by the Indians when these lands adjoined Indian country.[16] The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the Indian liquor laws to "buffer" areas the States would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the United States Supreme Court.[17] The power lasts only so lond as Indians are present on the retained reservation lands and remain wards of the Government.[18] In 1934, Congress withdrew liquor restrictions from the "buffer" lands.[19]

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[14] United States Constitution, art. I, sec. 8, cl. 18.

[15] United States Constitution, art. IV, sec. 3, cl. 2.

[16] Act of December 19, 1854, 10 Stat. 598 (Chippewa); act of March 1, 1895, 28 Stat. 693 (Indian Territory); act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); act of June 16, 1906, 34 Stat. 267 (Oklahoma, Indian Territory, New Mexico, and Arizona); act of May 6, 1910, 36 Stat. 348 (Yakima); act of June 20, 1910, 36 Stat. 557 (New Mexico and Arizona); act of May 11, 1912, 37 Stat. 111 (Omaha); act of July 22, 1912, 37 Stat. 197 (Colville); act of February 14, 1913, 37 Stat. 675 (Standing Rock); act of May 31, 1918, 40 Stat. 592 (Fort Hall); atc of June 4, 1920, 41 Stat. 751 (Crow).

[17] *Perrin* v. *United States*, 232 U. S. 478 (1914); *Dick* v. *United States*, 208 U. S. 340 (1908); *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491 (1883).

[18] *Perrin* v. *United States, supra.*

[19] Act of June 27, 1934, 48 Stat. 1245, now covered by 18 U. S. C. 1154, 1156, and 1161.

Excerpt From F. Cohen, Handbook of Federal Indian Law 307 (1982 ed.)

On a number of occasions, treaties or federal statutes continued federal Indian country liquor restrictions in areas formerly Indian country, and these provisions were uniformly upheld.[206] All such provisions were repealed in 1934.[207] A related provision, 18 U.S.C. § 1155, continues the restrictions for Indian school sites in areas that were previously Indian country.

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[206] *E.g.*, United States v. 43 Gallons of Whi[illegible]v, 93 U.S. 188 (1876). *See aslo* Rosebud Sioux Tribe v. Kneip, [illegible]0 U.S. 584, 611 (1977) (reference to statute retaining liquor laws in diminished reservation area).

[207] Act of June 27, 1934, ch. 846, 48 Stat. 1245.

Excerpt From Tr. of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Mgmt.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-1581)

5/13/96

Yang: [T]he carefully considered Department of Interior Solicitor's opinion confirmed that the Yankton Sioux reservation had not been diminished or disestablished. Especially great weight should be given to that opinion because it was authored by Felix Cohen a noted authority on federal Indian issues. In that 1941 opinion, Solicitor Cohen emphasized that this Act was different from other surplus land Acts that did diminish reservations

Judge: Is that in the appendix?

Yang: Yes, that was a reference in one of the other amici briefs and supplied in the supplemental appendix by the State, Your Honor. In that 1941 opinion, Solicitor Cohen emphasized that the Act was distinguishable from other surplus land acts because their open lands were scattered among the Indian allotments rather than being located in one well defined and discreet part of the reservation. And since no subsequent congressional act had changed reservation boundaries, the reservation continued in the same form that it had prior to the 1894 Act.

* * * *

Excerpt From Br. of the United States, *Erickson v. United States, Ex Rel Feather, (Decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975)) (No. 73-1500)

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra.* ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reservation is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

* * * *

A conclusion that these sections disestablish the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty, or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the new boundaries is the explicit meaning of *Ceiestine, supra,* and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,[6] including the Act of March 3, 1891, opening Lake Traverse and six other reservations. *Mattz v. Arnett, supra,* 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,[7] the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delinerated by definite property lines for all but Lake Traverse.[8]

* * * *

Instructions From the Dept. of Interior to the Register and Receiver at Mitchell, South Dakota, 20 Interior Dec 435

YANKTON INDIAN LANDS OPENED TO SETTLEMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 17, 1895.

REGISTER AND RECEIVER,
Mitchell, South Dakota.

GENTLEMEN: I have to call your attention to the proclamation of the President, dated May 16, 1895, together with the schedule of lands, copies of which are hereto attached,* by which the lands described in that schedule will be opened to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon, central standard time, of the twenty-first day of May, 1895, being certain tracts embraced in the cession of the Yankton tribe of Sioux Indians, by agreement ratified and confirmed by the twelfth section of the act of Congress approved August 15, 1894 (26 Stats., pages 314 to 319).

You will observe that it is stipulated in Article 10 of the agreement referred to that—

> Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States,

* Schedule not included herein.

> shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

You will at the proper time be furnished with a copy of a "Schedule showing lands reserved for religious organizations, school and Agency purposes, etc., on the Yankton Reservation in South Dakota".

Any religious society or other organization applying to purchase lands under said Article 10 must make proof, after six weeks publication, of its occupancy of such lands on December 31, 1892, the date of the agreement, and pay for the same at the rate of $3.80 per acre, within two years from the date of the act ratifying the agreement.

With regard to the lands described in the schedule, you will observe that the act referred to provides—

> That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United

States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must pay for the land entered at the time of making his original entry the sum of fifty cents per acre and at the time of making proof, whether under Sec. 2291 or 2301 R. S., the further sum of $3.25 per acre in addition to the fees now required by law. No final commission will be collected where the party submits proof under Sec. 2301 R. S. and the commissions in the original entry and in final entry under Sec. 2291 R. S., will be computed at the rate of $1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357 U. S. R. S. (See sections 2238 and 2290 U. S. R. S.)

It is stipulated by Article 8 of the agreement that the ceded lands shall be disposed of "to actual and bona fide

settlers only", while the act ratifying the agreement provides that "the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged". No mention is made of sections 2306 and 2307 of the Revised Statutes, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public lands generally, to make additional entries, to certain cases, free from the requirement of actual settlement on the entered tract (see pages 23 and 24 of the General Circular of February 6, 1892). It is therefore held that additional entries cannot be made for these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 23 and 24 of said circular, make affidavit that the entry is made for actual settlement and cultivation according to section 2291, as modified by sections 2301, 2304 and 2305 of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced, and the additional payment will be required to be made before the issue of the final certificate.

Town-site entries will be made for said lands in accordance with the general laws applicable thereto (See Circular of July 9, 1886, 5 L. D., 265).

In addition to the usual original homestead receipt (form 4-137) for the fee and commissions, you will issue a receipt of form 4-140a for the purchase money paid when the original entry is made, and when the final payment is made, you will issue a receipt of like form in addition to the final homestead receipt (form 4-140) for the final commissions, except in cases where the party makes proof under Sec. 2301 R. S. when no final commissions will be collected and therefore, only one form of receipt (4-140a) will be issued.

You will report the purchase money in all cases upon your current cash abstracts, but, except when proof is

made under Sec. 2301 R. S., no cash certificate will be issued. In all other respects you will use the ordinary homestead and town-site blanks in connection with the entry of these lands, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries for these lands are made under the act of August 15, 1894, Sec. 12.

Should any of the parties named in the second paragraph of the portion of the act quoted, the applications in your office for the purchase of the lands therein referred to, you will forward the same through this office for the consideration of the Department.

No comment appears necessary upon the closing paragraph of the said section 12.

Very respectfully,

S. W. LAMOREUX,
Commissiofier.

Approved,
HOKE SMITH, *Secretary.*

Excerpt From Br. for the Pet., *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra*, ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reservation is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

* * * *

A conclusion that these sections disestablished the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the ne wboundaries is the explicit meaning of *Celestine, supra,* and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,[6] including the Act of March 3, 1891, opening Lake Traverse and six other servations. *Martz v. Arnett, supra,* 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,[7] the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse.[8]

* * * *

Excerpt From *DeCoteau v. District County Court*
420 U.S. 425, 463-464 (1975)

* * * *

* * * In contrast to the instant reservation, one other tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" a *described tract*.[8] Another agreed to "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation" all their claim, title, and interest in *a described tract*.[9] Another agreed to "cede, sell, and relinquish to the United States all their right, title and interest in and to all that portion" of a named reservation *as specificall ydescribed*.[8] Another agreed to sell to the United States "all that portion" of the reservation *described by metes and bounds*.[9] Congress made an unmistakable change when it came to the lands ceded in the instant case. (Emphasis added).

* * * *

Excerpt From Tr., *Erickson v. United States ex rel. Feather (Decided With DeCoteau v. District County Court*, 420 U.S. 425 (1975)) (No. 73-1500)

* * * *

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession",

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no *specific area ceded*, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded—

QUESTION: Yes.

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective. (Emphasis added).

* * * *